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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price., Circuit Court Judge

Appellate Case No. 2023-000783

1 Dragon's Ascent Video
Gaming Machine; SC Games
of Skill, LLC.

Respondents,

v.

South Carolina Law
Enforcement Division (SLED)

Appellant.

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STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

IN THE MAGISTRATES COURT

South Carolina Law Enforcement Division
(SLED))

PLAINTIFF(S))

vs.)

ORDER OF DESTRUCTION/
NOTICE OF POST SEIZURE HEARING

1 Dragons Ascent video gaming
machine j SC Games of Skill, LLC)
DEFENDANT(S) B

2021 CV0810602903
CIVIL CASE NUMBER

Pursuant to S.C. Code Ann. §12-21-2712, the above listed machine(s) were seized on **November 19, 2021** from **LG's by the Creek** located at **1005 Tanner Ford Blvd Ste 105, Hanahan, SC 29410** (address) by the Plaintiff and brought before me on **November 19, 2021** for examination to determine if the machine(s) are prohibited pursuant to S.C. Code Ann. § 12-21-2710.

Upon careful examination of the machine(s), I find the machine(s) to be: a vending or slot machine, or a video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to S.C. Code Ann. § 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine.

I find that the Defendant's machine(s) are in violation of S.C. Code Ann. §12-21-2710 and do hereby order their destruction. **The Defendant has 15 days from the date of receipt of this Order to request a post seizure hearing to contest the illegality of the machine(s). Otherwise, the machine(s) will be destroyed.**

Pursuant to state law, the **State Law Enforcement Division** is authorized to retain, expend, and carry forward all monies associated with illegal gaming devises seized by the Department, once orders of destruction and awarding of these monies have been received from a court of competent jurisdiction. I find that \$ 3,651⁰⁰ was seized by the Department and shall be retained for the purposes provided by law.

AND IT IS SO ORDERED.

November 19 2021



(MAGISTRATE)

STATE OF SOUTH CAROLINA)
)
)
 COUNTY OF BERKELEY)
)
)
 SOUTH CAROLINA LAW)
 ENFORCEMENT DIVISION (SLED),)
)
 Plaintiff,)
)
 vs.)
)
 1 DRAGON'S ASCENT VIDEO)
 GAMING MACHINE; SC GAMES OF)
 SKILL, LLC.)
)
 Defendants.)
)
)
 _____)

IN THE MAGISTRATE COURT
 CASE No. 2021CV0810602903

CS FILED
 AUG 11 2022
 Goose Creek
 Magistrate's Office

ORDER

THIS MATTER comes before the Court on February 4, 2022, in accordance with S.C. Code §12-21-2712 for a hearing to determine whether possession of one (1) Dragon's Ascent Video Gaming Machine violates S.C. Code §12-21-2710 or any other law of the State of South Carolina. For the reasons stated herein, the Court finds that the Dragon's Ascent machine seized by SLED violates state law and must be destroyed pursuant to S.C. Code §12-21-2712.

I. Background Facts

On November 19, 2021, one (1) Dragon's Ascent Video Gaming Machine was seized from a business operating as LG's By the Creek located at 1005 Tanner Ford Boulevard, Suite 105, Hanahan, Berkeley County, South Carolina. The undersigned examined the machine and found that the machine was an illegal gambling device in violation of S.C. Code §12-21-2710 and ordered the destruction of the machine

pursuant to S.C. Code §12-21-2712. The Defendant requested a post-seizure hearing which followed.

II. Analysis

Dragon's Ascent is a point-and-shoot game in which the player attempts to capture dragons of varying sizes, colors, and point values as they move across the screen. The game is a currency-activated electronic game. The player inserts currency into a bill acceptor, establishing the credits the player uses to play the game. The value of each credit for each game is determined by the player. For example, if a player inserts a ten-dollar (\$10.00) bill, he or she would receive ten dollars (\$10.00) worth of credits. The player then selects a shot value of between ten cents (\$.10) and two dollars (\$2.00) per shot. The player retains the ability to adjust the shot value up or down during the game, but once selected for a particular shot, the player must wait until the next shot to make that adjustment.

A session of play begins when the player, without any time limit, decides to take the first shot at a dragon. A player can elect to terminate that session of play at any time. The dragons have different appearances, present various levels of difficulty to capture, and have different values assigned to them, all of which are explained on a "Help Screen" that is accessible to the player at any time. Depending on a player's ability to capture the dragons, the associated redemption value will be applied to the number of credits used to capture a particular dragon, with the result added to the player's credit account balance.

Game play occurs by the use of a panel on which is located various controls. The player is represented on screen by a turret controlled by a joystick used for aiming. A

"Raise Shot Cost" button is used to set the number of credits to be used on the next play (shot). A "Lock-on/Menu" button is used by the player to switch between "aim and shoot" and "lock-on modes." The player may choose to aim the turret at a specific dragon ("aim and shoot" mode) or chose "lock on mode" which enables the shots to always hit the "locked-on" dragon. A "Shoot Button" is used by the player to fire a shot at a dragon. "Shot Power" is graphic representations of five (5) small vials of fluid which the player uses to judge the power of a shot when shooting for optimal effect. The five (5) vials are filled with different colored fluid, one for each group of dragons. If a player successfully captures a dragon of the same color of the shot when it hits the dragon, the player can maximize his or her reward. Finally, the game features a "Ticket Button" that is used by the player to print a redeemable receipt which the player can exchange for cash.

"At a post-seizure hearing, the burden is on the owner of the *res* [the seized machine] to show why the seized property should not be forfeited and destroyed." Union County Sheriff's Office v. Henderson, 395 S.C. 516, 719 S.E.2d 665, 666 (2011); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

S.C. Code §12-21-2710 establishes that it is unlawful for a person to possess or operate or permit to be possessed or operated a machine (vending, slot, or video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value) for the play of poker, blackjack, keno, lotto, bingo, or craps. That section further bans the possession or operation of any machine or device licensed by the State of South Carolina under S.C. Code §12-21-2720 and used for gambling. Finally, §12-

21-2710 prohibits the possession or operation of any device pertaining to games of chance of whatever name or kind. §12-22-1040 prohibits the operation or possession of a machine which simulates a bingo or slot machine.

The evidence presented in the instant case with respect to the Dragon's Ascent machine does not support a finding that the machine was operated for the play of poker, slot machines, blackjack, keno, lotto, bingo, or craps.

Dragon's Ascent does not simulate a bingo or slot machine.

The Court must next determine whether the Dragon's Ascent game seized by the Plaintiff is a game of chance or skill in the context of §12-21-2710.

A game of chance is defined as “[a] game in which chance rather than skill determines the outcome.” BLACK’S LAW DICTIONARY (6th ed. 1990). Chance is an “awareness of uncertainty and a conscious ignorance of the future.” L-J, Inc. v. South Carolina State Highway Department 270 S.C. 413, 434, 242 S.E.2d 656, 665 (1978).

Two tests are commonly used to determine whether games are games of skill or chance. The more liberal standard is known as the “pure chance doctrine.” Under this doctrine, only a scheme in which the result is determined solely by chance is a lottery or game of chance; if skill plays any part, the scheme is not a lottery or game of chance. See Johnson v. Collins Entertainment Co., Inc., 333 S.C. 96, 508 S.E.2d 575 (1998) (Burnett, J., dissenting). Justice Burnett rejected this doctrine, reasoning that under the “pure chance doctrine” many obviously chance-based games, such as guessing contests, would not be games of chance. Johnson, supra at 584. Justice Burnett instead suggested that the “dominant factor” test be the appropriate standard, indicating that where a dominant factor in a participant’s success or failure in a particular scheme

is beyond his control, the scheme is a game of chance, even though the participant exercises some degree of skill or judgment. Id. Under this test, if a participant's skill does not govern the result of the game, the scheme contains the requisite chance necessary to constitute a game of chance. On the other hand, if through the exercise of skill or judgment a participant can determine the outcome, the scheme is not a game of chance. Id. The South Carolina Supreme Court has yet to adopt either test as the bright-line rule in South Carolina, but this Court finds Justice Burnett's interpretation of the Constitution and declaration of the law in South Carolina to be the correct one and would apply the "dominant factor" test to the Dragon's Ascent machine.¹ See also Op. S.C. Att'y Gen., 2002 WL 31341812 (S.C.A.G. Aug. 28, 2002).

The Defendants aver that Dragon's Ascent is a game based entirely on the skill of the player and lacking all elements of chance. According to the Defendants, successful play is based entirely on the possession and exercise of such skills such as hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis, among others. The Defendants cite a formal opinion from the Office of the Attorney General for the District of Columbia in which it was opined that "[t]he Dragon's Ascent gaming machine contains no element of chance

¹ The Dragon's Ascent machine, for the reasons set forth more specifically herein, does not satisfy the "pure chance doctrine," as some degree of skill is used in playing the game. Thus, should the South Carolina Supreme Court adopt the "pure chance doctrine" as law, this machine would clearly be legal under the "games of chance of whatever kind" portion of S.C. Code § 12-21-2710.

and is therefore not a gambling device.” Op. DC. Atty Gen., p.1 (D.C.A.G. October 25, 2019).²

The Court heard testimony from defense expert Nick Farley, qualified by this Court as an expert on evaluating gaming devices. Mr. Farley testified as to his familiarity with Dragon’s Ascent and that as a player becomes more familiar with the game and the strategies and features connected therewith, the player can improve upon their skill, game results, and outcomes. While Mr. Farley did not observe this particular Dragon’s Ascent machine, nor did he observe any patrons of LG’s By the Creek playing the machine, he examined a machine that was identical to the machine seized by SLED. Mr. Farley testified that his expert opinion is that Dragon’s Ascent is a game that is one hundred percent (100%) skill and is certainly a game that is predominantly based in skill. Tr. Page 38, lines 22-23, Page 85, line 25.

The Court also heard testimony from Special Agent Ryan Wood, who personally went to LG’s By the Creek and played the seized machine as well as observed others playing the device. Wood testified that when playing the machine, he did not see or read any rules or learn of the existence of the “Help Screen” prior to his initial play session on the device. He testified that he inserted money into the machine, familiarized himself with the buttons on the console, and began playing by shooting at a dragon on the screen. Tr. Page 90-92. Wood testified that his results were “totally

² The District of Columbia Attorney General’s Opinion, while persuasive as to the amount of skill required in playing Dragon’s Ascent, is based upon an analysis of Dragon’s Ascent under the laws of the District of Columbia, not South Carolina, and is not binding upon this Court. Moreover, the South Carolina Supreme Court and Section 12-21-2172 require a machine-by-machine analysis, not a type of machine-by-type of machine analysis, and thus this Court must follow the seizure and destruction process outlined in Section 12-21-2172 as to the specific machine seized in the instant case. See Allendale County Sheriff’s Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004), State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 185, 525 S.E.2d 872, 876 (2000).

random” and that he shot at the same dragons the same number of times and received different results each time.

The Court further heard testimony from Brock Smith, the designer of Dragon’s Ascent. Mr. Smith testified that many people study the instruction manual for Dragon’s Ascent, come up with strategies, and practice a lot, enabling those persons to consistently make money on the machine. Mr. Smith testified that Dragon’s Ascent never thwarts the efforts of a player to win and does not ultimately dictate the outcome of every play and the results of the play at random. He testified that Dragon’s Ascent contains no random number generator. Mr. Smith testified that to play Dragon’s Ascent successfully, a player must access the “Help Screen,” study the manual, and learn the repeating dragon patterns. He testified that there are no time limit restrictions on a player, effectively meaning that a player can sit there as long as they wish and, if they have sufficient time and memory, can memorize the repeating dragon patterns. Mr. Smith testified and demonstrated a player’s ability to successfully play Dragon’s Ascent by understanding the repeating dragon patterns, the colors of the dragons, the colors of the “Shot Power” vials, and use of the turret correctly in making and timing each shot. In fact, during Mr. Smith’s play of the game within the courtroom, it would often take Mr. Smith thirty (30) minutes or more to successfully play the game.

While SLED is correct that players may not read the “Help Screen” prior to play and that reading the “Help Screen” is not a prerequisite for play, those facts are immaterial to the Court’s determination as to whether the game is one of skill or chance. As SLED acknowledges, some players may not have an education level sufficient to read the “Help Screen,” comprehend the rules, or apply them judiciously. However,

players of many games based solely in skill do not require a participant to “read the rulebook” prior to play. For example, a person may play a game of basketball or tennis without reading any rulebooks by simply picking up a ball and/or racket.

The Court finds that just as with any game of skill, a player may successfully play Dragon’s Ascent using keen hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis. Based on the evidence presented at the hearing, the Court finds that Dragon’s Ascent is a game in which skill predominates over chance.³

Following no relevant discussion on the matter at the hearing, the Court inquired of the parties as to whether Dragon’s Ascent was licensed under §12-21-2720. SLED avers that all video gaming machines, including this Dragon’s Ascent machine, are

³ This Court is mindful of the fact that Dragon’s Ascent is a game played predominantly in establishments that serve alcohol. While it is possible for anyone over the age of eighteen (18) to play Dragon’s Ascent, it is not probable that most Dragon’s Ascent players will exercise the dedication, patience, and deductive analysis in order to play the game successfully. The Court likens the successful play of Dragon’s Ascent to the successful completion of standardized field sobriety tests in the DUI context. The Court believes that a person in say, LG’s By the Creek, that has consumed alcoholic beverages is not likely to read the “Help Screen,” memorize the repeating dragon patterns, practice Dragon’s Ascent, and exercise the patience necessary to wait for the precise color dragon to match the precise “Shot Power” vial, aim the turret precisely, and take the shot at the precise time, just like a person under the influence of alcohol is not likely to listen to an officer’s precise instructions on the “walk and turn” or “one-legged stand” tests and execute these correctly. These “SFTs” are known as “divided attention” tests which measure a subject’s ability to perform certain tasks while distracted. The idea behind these tests is that a person under the influence of alcohol will be less likely to be able to perform those tests satisfactorily than a person that is sober. Dragon’s Ascent provides its own “divided attention” test in a way by measuring a player’s ability to perform the tasks required by the game while distracted by the game’s colorful display and features, the goings on at the establishment (interaction with other patrons, food, television, music, alcohol, etc.), and features like the “Rainbow Dragon,” a progressive jackpot that exhibits a monetary figure on the dragon, enticing a player to shoot that dragon to win the amount shown. Mr. Smith, the game’s designer, played Dragon’s Ascent for over an hour straight in the courtroom and never once attempted to shoot the “Rainbow Dragon.” Tr. Page 194, lines 15-17. Thus, while Dragon’s Ascent is a game that requires a high degree of skill to master its complexities, the Court believes that it is a game designed to make money for the “house,” not the player, in the context of regular game play, and brings with it the dire concerns referenced by Chief Justice Toal in her concurring opinion in Chimento, *infra*.

required to be licensed by the South Carolina Department of Revenue in order to be operated in accordance with South Carolina law. This statute logically prevents the owners of machines such as “Hoop Fever”⁴ or “Pac-Man,” in which a coin or cash is deposited for the play of a game based entirely in skill, from being used for gambling. The Defendants acknowledge that Dragon’s Ascent should be encompassed by §12-21-2720 but indicate that this Dragon’s Ascent terminal was mistakenly not licensed by the South Carolina Department of Revenue and argue that §12-21-2736 makes the existence of a license immaterial to the Court’s determination of the legality of the game terminal.⁵

Whether an oversight on the part of the General Assembly or an intentional omission, §12-21-2710 does not address machines **required to be** licensed pursuant to §12-21-2720 and used for gambling, but rather only those that **are** licensed pursuant to §12-21-2720 and used for gambling. However, a conclusion that machines required to be licensed pursuant to §12-21-2720 but not so licensed (intentionally, mistakenly, or otherwise), are legally able to be used as gambling devices while licensed machines are not would constitute an absurd result⁶, making the key issue for the Court to determine

⁴ Hoop Fever is a coin/currency operated basketball game in which the player shoots basketballs into a basketball goal with the object of the game being to make as many shots as possible within the allotted time. A player obtains a higher or lower score depending on shots made but the machine does not return to the player anything of value.

⁵ S.C. Code §12-21-2736 states that “[t]he issuance of a license under the provisions of this article by the department does not make lawful the operation of any gambling machine or device, the operation of which is made unlawful under the laws of this State.”

⁶ In construing a statute, Courts should reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature. Lancaster County Bar Ass’n v. South Carolina Com’n on Indigent Defense, 380 S.C. 219, 670 S.E.2d 371 (2008). Certainly, the General Assembly in South Carolina did not provide for such a “loophole” as it relates to machines required to be licensed under §12-21-2720. This idea is supported by §12-21-2736 and S.C. Code §12-21-2742, which provides for the seizure and confiscation by the Department of Revenue, its agents or employees, of any

as being whether any machine required to be licensed pursuant to §12-21-2720 **is used for gambling.**

In Town of Mount Pleasant v. Chimento, the South Carolina Supreme Court interpreted South Carolina's "statutory" definition of gambling in the context of S.C. Code §16-19-40. Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012). The Chimento Court noted that under the plain language of §16-19-40, gambling on a game of skill is a violation of the law if that gambling is being done in a prohibited location. Id. The Court held that the "statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance." Id. at 837. According to the Supreme Court, "gambling" as defined in South Carolina includes betting money on the outcome of any "game" whatsoever, regardless of the amount of skill involved in the game. Id. The Court further referenced the case of State v. Red, 41 S.C.L. (7 Rich.) 8 (1853), in which the Red Court found that a game based on the proprietor's juggling (an exhibition of the proprietor's dexterity), was gambling because the proprietor "...kept a bank, and a wager depended on his success or failure." Id. At 837. The Chimento Court concluded that gambling/gaming depends not on the skill/chance ratio, but rather on the wager, holding "[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, **but whether there is money or something of value wagered on the game's outcome.**" Id. at 838 [emphasis added].

In the Speedmaster case relied upon by the defense, the South Carolina Court of Appeals acknowledged the existence of the Town of Mount Pleasant v. Chimento

machine not having attached thereto the required license, although the latter statute allows for such seized machines to be sold at public auction, not destroyed.

case and the possibility that the Supreme Court may clarify the law on this topic. See S.C. L. Enft Div. v. 1-Speedmaster S/N 00218, 397 S.C. 94, 98, *footnote 1*, 723 S.E.2d 809, 811 (Ct. App. 2011). The South Carolina Supreme Court did just that, setting forth binding precedent as to games of skill and gambling thereon. As such, the determination as to whether this Dragon's Ascent machine is an illegal gambling device is not limited to the skill/chance ratio, but rather on the existence of a wager. The evidence in the record clearly established that players select the amount of money to play on individual shots and that the amount of money the player stands to win directly correlates to the amount wagered – *i.e.*, the more you pay to play, the more you stand to win on this device. Tr. Page 125. In fact, this device has a "Raise Shot Cost" button, which directly facilitates the player's ability to wager on the device. Tr. Pages 92-93. Once a player presses the "Cash-Out" button, Dragon's Ascent will pay out via a voucher that can be redeemed for United States currency "down to the penny." Tr. Page 59, lines 2-9. A machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition. Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) *quoting* 27 C. J. 989. Some Courts hold that a machine is a gambling device if it holds out an inducement to play in the expectation that by the play the machine will be set to indicate a larger reward the following play. Id.

The Chimento Court held that although Texas Hold'em was a game in which skill predominates, a person "games" or "gambles" when money is wagered thereon. The credible evidence before the Court supports the conclusion that money or something of value is wagered on the outcome of each Dragon's Ascent "play" and players do so with

the expectation of a larger reward upon further play. In using the Chimento Court's reasoning, this Court finds that although Dragon's Ascent is a game in which skill predominates, a person "gambles" when money is wagered in so playing. To hold otherwise would effectively legalize wagering and payouts for all games of skill, including golf, basketball, and the like. The Dragon's Ascent machine also has several characteristics of gambling devices, including but not limited to the free play feature, the meter which records the amount of points that are redeemed, and the fact that the machine does not give change. As Dragon's Ascent is a game required to be licensed under S.C. Code §12-21-2720, the Court finds that S.C. Code §12-21-2710 prohibits its use as a gambling device and as such, the machine must be destroyed.

Moreover, while much of the focus of the parties with respect to Dragon's Ascent has been its legality under §12-21-2710, S.C. Code §12-21-2712 requires this Court to direct that the machine be immediately destroyed if it is in violation of S.C. Code §12-21-2710 "**or any other law of this State.**" S.C. Code §12-21-2712 [emphasis added]. S.C. Code §16-19-50 provides that it is unlawful for a person to set up, keep, or use any machine or device licensed pursuant to §12-21-2720 and used for gambling purposes. The Court additionally finds that the playing of Dragon's Ascent by patrons of LG's By the Creek violates §16-19-50 and must be destroyed pursuant to §12-21-2712.

III. Conclusion

For the foregoing reasons, the Court finds that the Dragon's Ascent machine seized by SLED violates state law. Therefore, the Court orders that the Dragon's Ascent machine seized in the instant case shall be hereinafter destroyed thirty (30) days after the date of this order.

IT IS SO ORDERED.



Rad S. Deaton
Berkeley County Magistrate

Goose Creek, South Carolina
August 11, 2022

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

1 Dragon’s Ascent Video Gaming Machine;
SC Games of Skill, LLC,

C/A No. 2022-CP-08-02026

ORDER

Appellants,

vs.

South Carolina Law Enforcement
Division (SLED),

Respondent.

This matter is before me on appeal from an August 11, 2022 order of the magistrate court (the “magistrate court order”) holding that a “Dragon’s Ascent” video machine owned by Appellant SC Games of Skill, LLC, is illegal under S.C. Code Ann. § 12-21-2710 and must be destroyed pursuant to S.C. Code Ann. § 12-21-2712. Based on a detailed recitation of the testimony and evidence presented at a lengthy post-seizure hearing, the magistrate court correctly found that Dragon’s Ascent is a game of skill, *i.e.*, that skill predominates over chance in determining the outcome. (Order, at 4-8.) This holding was not appealed by Respondent State Law Enforcement Division (“SLED”), and accordingly it is the law of the case. In addition, I agree with the magistrate court order as to this finding.

Despite finding that Dragon’s Ascent is a game of skill, the magistrate court nevertheless held that the machine violates S.C. Code Ann. § 12-21-2710 according to *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), which involved a completely different statute, S.C. Code Ann. § 16-19-40. The magistrate court interpreted *Chimento* as abandoning the longstanding “skill vs. chance” test applicable under § 12-21-2710 and adopting a novel

“wagering” test, under which any consideration paid to participate in any game constitutes illegal gambling, regardless of the degree of skill involved. (Order, at 10-13.) Applying this “wagering” test, the magistrate court concluded that “although Dragon’s Ascent is a game in which skill predominates, a person ‘gambles’ when money is wagered in so playing,” and therefore the machine violates § 12-21-2710. (Order at 11.) Appellant appeals this ruling, arguing that the traditional multiple-decades-old definition of gambling is payment of something of value, to participate in a game based on chance, to win a prize. *Ward v. West*, 387 S.C. 268, 692 S.E.2d 516 (2010).¹

For the reasons set forth herein, this Court agrees with Appellants that the magistrate court misapplied *Chimento* and that the determination of legality under § 12-21-2710 begins and ends with the skill vs. chance inquiry. Conversely, in order to affirm, this Court would have to accept or ignore all of the following untenable propositions:

- That in deciding *Chimento*, the Supreme Court silently overruled decades of precedent recognizing the legality of skill games in this State without clearly stating it was doing so, contrary to its consistent practice of explicitly announcing that it is overruling prior decisions when it intended an opinion to do so;
- That the *Chimento* opinion repeatedly stated that it was solely concerned with interpreting and applying S.C. Code Ann. § 16-19-40—which is completely irrelevant to post-seizure hearings under § 12-21-2710—can simply be ignored;
- That this Court should also disregard multiple post-*Chimento* rulings and decisions from various South Carolina courts, including a per curiam opinion by the same five justices who decided *Chimento*, applying the long-established “skill vs. chance” test to determine legality of a video game under § 12-21-2710; and
- That the interpretation of *Chimento* by the magistrate court is correct even though it would make it illegal for any person in this state to pay, in one

¹ This unanimous decision of the Supreme Court in *Ward*, decided two years before *Chimento*, repeated this long-recognized definition of gambling as containing three elements—consideration, chance and reward.

way or another, to participate in a skill-based game for a prize—activities that encompass everything from local spelling bees, to nationally renowned events like the Heritage Golf Tournament at Hilton Head, and even state-sponsored events like the Governor’s Cup fishing tournament.

Accordingly, this Court reverses the magistrate court’s adoption of a novel “wagering” test from *Chimento* and its application of that test to find Dragon’s Ascent is illegal.

I. BACKGROUND

On November 19, 2021 a Dragon’s Ascent video machine was seized from a business called LG’s By The Creek, located at 1005 Tanner Ford Boulevard, Hanahan, South Carolina. After examining the machine, the magistrate court made a preliminary finding that it was an illegal gambling device under S.C. Code Ann. § 12-21-2710 and ordered its destruction pursuant to S.C. Code Ann. § 12-21-2712. After Appellant requested a post-seizure hearing, one was held on February 4, 2022.

The testimony and evidence at this post-seizure hearing established that Dragon’s Ascent is an aim-and-shoot video game in which the player attempts to capture dragons of varying sizes, colors, and point values as they move across a screen. To begin playing, the player inserts currency into a bill acceptor, establishing the credits the player uses to play the game. For example, if the player inserts a ten-dollar bill, the game will show that the player has \$10 worth of credits. Using a “Shot Cost” button, the player selects a value of between 10¢ and \$2 for each shot. Between each shot, the player can adjust the shot value up or down. The shot value has no bearing on the number of shots needed to capture a dragon. A session of play begins when the player, without any time limit, decides to take the first shot at a dragon.

Game play occurs by the use of a panel on which is located various controls. The player is represented on screen by a turret controlled by a joystick used for aiming and a shot button used for firing. “Shot Power” is a graphic representation of five small vials, each filled with fluid. The

player uses the level of fluid in each vial to determine the power of a shot when shooting in order to maximize the reward for capturing the targeted dragon. The dragons are of different sizes, shapes, and most importantly colors. A key aspect of success in the game is the player's ability to match the color of his or her turret, which rotates through a repeating cycle of colors, to the color of the targeted dragon. The closer the color match at the moment a shot is accurately fired, the fewer shots will be required to capture the dragon and the greater the reward to the player. The amount awarded for capturing each dragon is determined according to a formula that is set in advance, involves no algorithms or random number generators, and is fully disclosed on the Help Screen² available to the player at all times, including prior to depositing any currency into the bill acceptor. Finally, the game also features a "Ticket Button" that the player uses to print a redeemable receipt which the player can exchange for cash.

II. LEGAL STANDARD

"An action for forfeiture of property is a civil action at law." *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011) (quoting *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006)). On an appeal of a magistrate court's judgment:

[T]he appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

S.C. Code Ann. § 18-7-170; *see also* S.C. Code Ann. § 18-7-140 (on appeal from a magistrate court order, the circuit court "shall have the same power over its own determinations, and shall render judgment thereon in the same manner, as the circuit court in actions pending therein, without trial by jury"). "Sections 18-7-140 and 18-7-170 give the Circuit Judge sitting in an

² The Help Screen provides detailed instructions on how to successfully play this game.

appellate capacity the ability to make a determination in the same manner as Circuit Courts in trials without a jury and to reverse a judgment for errors of fact even though the Circuit Judge may not have had the opportunity to observe the demeanor of the witnesses.” *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 234, 312 S.E.2d 20, 21 (Ct. App. 1984); *see Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001) (“Section 18-7-170 provides that on appeal from Magistrate’s Court, the Circuit Court may make its own findings of fact.”).

“Determining the proper interpretation of a statute is a question of law” subject to *de novo* review. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). S.C. Code Ann. § 12-21-2710 is a penal statute and “when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.” *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Moreover “[a]s a general rule, ... forfeitures are not favored in the law or equity.” *Ducworth v. Neely*, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct. App. 1995) (civil forfeiture action in drug related matter).

III. ANALYSIS

The legality of the Dragon’s Ascent machine is governed by S.C. Code Ann. § 12-21-2710, which prohibits:

any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind[.]

As the magistrate court order correctly observed, Dragon’s Ascent obviously is not a machine “for the play of poker, blackjack, keno, lotto, bingo, or craps.” Thus, the critical question is whether it

is a game of chance or skill. *See SLED v. I-Speedmaster S/N 00218*, 397 S.C. 94, 99, 723 S.E.2d 809, 812 (Ct. App. 2011) (holding that skill, as opposed to chance, is what distinguishes a legal activity from illegal “gaming” or “gambling”).

A. The Magistrate Court Correctly Found that Dragon’s Ascent Is a Game of Skill

This Court agrees with, and adopts in full, the magistrate court’s determination that Dragon’s Ascent is a game of skill:

The Court finds that just as with any game of skill, a player may successfully play Dragon’s Ascent using keen hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis, Based on the evidence presented at the hearing, the Court finds that Dragon’s Ascent is a game in which skill predominates over chance.

(Order, at 8.)

SLED devotes a substantial portion of its Respondent’s Brief to its argument that Dragon’s Ascent is not a game of skill. Because SLED did not file a notice of cross-appeal, however, it cannot challenge this finding. An unappealed ruling, “right or wrong, is the law of this case and requires affirmance.” *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

Even if SLED had filed a notice of cross-appeal, it would make no difference because the magistrate court’s finding that Dragon’s Ascent is a game of skill is manifestly correct and is fully supported by the testimony of experts and evidence presented at the post-seizure hearing. This included the testimony of Nick Farley, whom the magistrate court recognized without objection as an expert in the evaluation of video games. Mr. Farley testified, based upon his examination of the

Dragon's Ascent game,³ that as a player can improve upon his or her skills, and achieve better outcomes, by becoming more familiar with the game and the available strategies and features. Mr. Farley's expert opinion is that Dragon's Ascent is a game that is 100 percent skill and thus is certainly a game that is predominantly based in skill.

The magistrate court also heard testimony from the designer of Dragon's Ascent, Brock Smith. Without objection, the magistrate court qualified Mr. Smith as an expert in the design and operation of Dragon's Ascent. Mr. Smith testified that many individuals will study the instruction manual for Dragon's Ascent, practice often, and develop strategies, all of which enables them to consistently succeed in playing this game successfully. Regarding the design of Dragon's Ascent, Mr. Smith testified that he was tasked with developing a game that was "100 percent skill—no chance involved." (Hr'g Tr. 153:6-11.) Mr. Smith, aided by a staff of 20 individuals, spent five years developing Dragon's Ascent. He testified that the game never thwarts a player's efforts to win. It contains no random number generator, algorithm, or other device or coding that might override the player's skill. Finally, he testified that he successfully played Dragon's Ascent for 16 consecutive games just prior to the delivery of the machine to LG's By The Creek. During the hearing he successfully played Dragon's Ascent four consecutive times in the courtroom.

SLED presented testimony from Special Agent Ryan Wood, who played the Dragon's Ascent machine and observed others playing it. Special Agent Wood testified that he did not read any rules or study the Help Screen prior to his initial play session on the game. He testified that he inserted money into the machine, familiarized himself with the buttons on the console, and began playing by shooting at dragons on the screen. Special Agent Wood felt that his results were "totally

³ The machine examined by Mr. Farley was identical to the machine seized from LG's By The Creek.

random” in that it seemed like he obtained different results even when shooting at the same dragons the same number of times. (Hr’g Tr. at 108:19-25.) In light of the testimony of Mr. Farley and Mr. Smith, however, the Court concludes it is far more likely that what Special Agent Wood perceived as different results from multiple shots at the same dragon was, in reality, a result of the differing degree to which his shots matched the color of the target dragon. Maximizing the reward for capturing a dragon by paying close attention to the Shot Power vials and matching the color of the shot fired as closely as possible to the color of the target dragon clearly involves the exercise of skill such as timing, hand/eye coordination, and selectivity. It also accounts for the fact that shots fired at the same dragon will produce more credits or less credits, depending on the shot power and color match.

More broadly, Special Agent Wood’s testimony demonstrates that skill plays the predominant role in the outcome of Dragon’s Ascent even if the player never reads the Help Screen, takes the time to learn the dragons’ patterns, or actively monitors the Shot Power vials. Successful play (*i.e.*, capturing a dragon) inevitably requires hand/eye coordination, aim, timing, manual dexterity, and concentration. Therefore, whether the average player will read the help screen has no bearing on whether Dragon’s Ascent is in fact a game of skill. *See, e.g.*, S.C. Att’y Gen. Op., 2003 WL 21108489, at *2 (S.C.A.G. May 5, 2003) (“Courts considering whether elements of skill are involved in the playing of a particular game have examined factors such as whether the player must demonstrate attributes such as manual dexterity, hand-eye coordination, reflexes, muscular control or the ability to concentrate.”); S.C. Att’y Gen. Op., 2002 WL 31341812, at *2 (S.C.A.G. Aug. 28, 2002) (same); *see also, e.g., Wnek Vending & Amusements Co. v. City of Buffalo*, 434 N.Y.S.2d 608, 612 (N.Y. Sup. Ct. 1980) (video game was one of skill because success “depend[ed] upon eye-hand coordination, reflexes, muscular control and above

all, concentration” as well as “[p]roper timing in aiming and firing”); *Crazie Overstock Promotions, LLC v. State*, 830 S.E.2d 871, 873 (N.C. Ct. App. 2019), *aff’d*, 858 S.E.2d 581 (N.C. 2021) (game that tests player’s hand-eye coordination is a game of skill).⁴

As noted above, the magistrate court’s ruling that Dragon’s Ascent is a game of skill is the law of the case because SLED did not file a notice of cross-appeal. Nevertheless, and for the avoidance of doubt, this Court fully agrees with and therefore affirms the magistrate court’s finding that Dragon’s Ascent is a game of skill.⁵

⁴ The Court does not doubt that Special Agent Wood acted in good faith in seizing the Dragon’s Ascent machine; he simply lacks the training and knowledge to offer persuasive testimony on the issue of its legality. There is no evidence that Special Agent Wood or anyone else on behalf of SLED viewed or analyzed the operating software, the underlying source code, or the internal operations of Dragon’s Ascent. The expert testimony from Mr. Smith, who designed the game, and Mr. Farley, who independently conducted a painstaking examination of the machine, its code, and the manner of its operation, far outweighs Special Agent Woods’s genuine but unfounded view that “this game is pretty simple to me.” (Hr’g Tr. at 121:3-4.) To the contrary, Dragon’s Ascent is in fact a very sophisticated, multi-featured game that rewards players who invest the time and effort needed to develop their skills in playing it.

⁵ As already noted, SLED’s challenges to this finding are not before the Court because SLED did not file a notice of cross-appeal. Nevertheless, the Court notes that SLED’s response brief makes factual statements that are at best unsupported by the record and at worst are contradicted by it. For example, SLED contends that “the functionality of this device preys on the addictive nature of gaming machines” and that certain features of the game are “what keeps players playing.” (Resp. Br. at 19.) However, there is nothing whatsoever in the record regarding whether video games in general have an “addictive nature” or the effect on players of the specific features of Dragon’s Ascent. If SLED had wanted to present testimony regarding the psychology of video games, it could have attempted to find an appropriate expert. Having failed to do so, SLED cannot be allowed to simply invent facts in a “win at any cost regardless of the facts” approach.

Another unsupported factual contention is SLED’s claim that “the device’s algorithm ultimately dictates the outcome of each and every single play on this machine” and that “a player’s knowledge, skill, dexterity, or ability absolutely cannot improve the overall result because this is entirely controlled by the algorithm of the machine.” (Resp. Br. at 16.) SLED does not cite any part of the record to support this totally unfounded statement, and in fact the uncontradicted evidence is that Dragon’s Ascent does not contain any “compensating algorithms” or “random number generators” that might overcome the effect of a player’s skill. (Hr’g Tr. 34:12-19.)

B. The Magistrate Court Erred in Its Interpretation of *Chimento*

Under settled law, the magistrate court’s finding that Dragon’s Ascent is a game of skill established that it is not “gaming” or “gambling” and therefore is not prohibited by S.C. Code Ann. § 12-21-2710. See *Speedmaster*, 397 S.C. at 100, 723 S.E.2d at 812; *Allendale Cnty. Sheriff’s Office v. Two Chess Challenge II*, 361 S.C. 581, 583, 606 S.E.2d 471, 472 (2004). Nevertheless, the magistrate court separately considered whether the Dragon’s Ascent machine was “used for gambling” and adopted a novel “wagering” test to perform this analysis.⁶ (Order at 10.) The magistrate court derived this test from *Chimento*, citing that case for the proposition that “[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game’s outcome.” (Order at 10 (quoting *Chimento*, 401 S.C. at 533, 737 S.E.2d at 838).) After considering the written briefs and the parties’ oral arguments, this Court is persuaded that the magistrate court erroneously interpreted *Chimento* as applying to the issues in this case.

First, the question of a machine’s legality under S.C. Code Ann. § 12-21-2710 was not presented in *Chimento*—indeed, the majority never even cited § 12-21-2710. Rather, the appellants in *Chimento* were convicted of violating S.C. Code Ann. § 16-19-40 by playing “cards” in a “house used as a place of gaming.” In a divided opinion, the Supreme Court reversed the circuit court order setting aside their convictions. Tracing the history of § 16-19-40, the Supreme Court

⁶ The Court notes that although the parties’ briefs discuss whether Dragon’s Ascent has a “free play” feature, the magistrate court did not find the machine to be illegal on this basis. In *dicta*, the magistrate court simply listed “the free play feature” as one of several ways in which the machine seemed to have “characteristics of gambling devices.” (Order, at 12.) In any event, the testimony and evidence clearly demonstrates that what the magistrate court erroneously described as a “free play feature” is nothing of the kind. Rather than a “free play” feature that provides “an entire game free of charge,” Revenue Ruling 16-4, 2016 WL 8794171 (S.C. Dep’t of Rev. May 17, 2016), Dragon’s Ascent has a “free shot” feature that is merely an entertaining way of revealing (not awarding) the credits that the player has already won by previously capturing certain dragons.

concluded that this particular statute applied to the playing of certain specified, enumerated games (such as cards or dice) in certain specified, enumerated locations (such as a kitchen, a barn, or a house used as a place of gaming), regardless of whether they were games of chance or skill. *See id.* at 531, 737 S.E.2d at 836 (“[Section] 16-19-40 criminalizes the playing of certain games and gambling.”).

That *Chimento*’s analysis and holding are limited to § 16-19-40 becomes even clearer upon review of the concurrence written by Chief Justice Toal and the dissent written by Justice Hearn. Chief Justice Toal “agree[d] wholeheartedly” with Justice Hearn’s conclusion that § 16-19-40 is unconstitutionally vague. *Id.* at 536, 737 S.E.2d at 839 (Toal, C.J., concurring); *see id.* at 547-552, 737 S.E.2d at 845-847 (Hearn, J., dissenting). She joined the majority, however, because “we cannot sever the language, ‘a house used as a place of gaming,’ from section 16-19-40 without striking the provision in its entirety,” which she feared would “open the door wide to *all* heretofore illegal gaming practices in this state, including video poker.” *Id.* at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (emphasis in original).

Justice Hearn’s explanation of why Chief Justice Toal’s concern was entirely misplaced is because of the difference between § 16-19-40 and § 12-21-2710:

The prohibition of video poker is found in Section 12–21–2710 of the South Carolina Code (2000). This is a completely separate section (and title) of the code and makes no reference at all to section 16–19–40. In fact, it is entirely independent and separate from the general gambling prohibitions involved here. Striking section 16–19–40 in whole or in part would have no impact on section 12-21–2710.

Id. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting, and concurred in by Justice Kittredge). Notably, the *Chimento* majority opinion did not challenge Justice Hearn on this important explanation.

Second, accepting the magistrate court’s reading of *Chimento* would require this Court to conclude that the Supreme Court overruled decades of precedent without saying it was doing so.

However, numerous decisions demonstrate that when the Supreme Court overrules existing law, it clearly and explicitly states that it is doing so—including in cases involving gambling. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196-97, 525 S.E.2d 872, 883 (2000) (stating, in a case concerning the application of S.C. Code Ann. § 12-21-2710, “We overrule *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), to the extent it permits the destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate’s determination of illegality.”); *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 321, 778 S.E.2d 888, 890 (2015) (“[W]e now overrule our decisions that have implicitly authorized recovery beyond” specific statutes providing for the recovery of gambling losses); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477-78, 527 S.E.2d 763, 765 (2000) (per curiam) (stating that “we overrule our cases which apply the traditional approach” to substantive due process analysis); *Paradis v. Charleston Cnty Sch. Dist.*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021) (“We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state.”).

Third, this Court cannot reconcile the magistrate court’s interpretation of *Chimento* with *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam), decided a mere two years after *Chimento* by the same five justices. In *Awde*, the Court unanimously affirmed a magistrate court’s “finding that two ‘Chess Challenge II’ devices before it were legal games of skill.” *Id.* The parties’ briefs raised arguments concerning, *inter alia*, the “used for gambling” prong of § 12-21-2710. If the Supreme Court had intended *Chimento* to apply when determining the legality of a machine under § 12-21-2710, it surely would not have issued an affirmance in *Awde*. The fact that the Court affirmed—in an unpublished, per curiam opinion—strongly demonstrates that the “wagering” test used in *Chimento* does not apply

to the analysis of whether a game is legal under § 12-21-2710 but, in fact, is limited solely to § 16-19-40.

In addition to the Supreme Court’s post-*Chimento* ruling in *Awde*, all of the following have applied the dominant factor test in the years after the *Chimento* decision: the Attorney General;⁷ the Administrative Law Court;⁸ the Circuit Court;⁹ and the Court of Appeals.¹⁰ Moreover, no court or other authority has ever cited *Chimento* for the proposition that any video game involving consideration and a potential prize is illegal regardless of whether the outcome is determined by chance or the player’s skill. Rather, South Carolina courts at every level have only cited *Chimento* for the entirely unrelated subject of standards for constitutional challenges to statutory provisions.¹¹ Notably, one of these cases involved the legality of a video game machine under § 12-21-2710. *See Smith v. SLED*, 2013 WL 8477943 (S.C. Ct. Com. Pl., Anderson County, Nov.

⁷ *See Op. S.C. Atty Gen.*, 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that “South Carolina gambling laws” prohibit “games of chance”).

⁸ *See SCDOR v. Chestnut*, 2021 WL 4822858, at *6 (Oct. 8, 2021) (stating that “games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710”).

⁹ *See Smith v. SLED*, 2013 WL 8477943, at *2 (S.C. Ct. Common Pl., Anderson County, Nov. 6, 2013) (“[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]”).

¹⁰ *See SCDOR v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) (“[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12–21–2710[.]”).

¹¹ **Supreme Court:** *S.C. Hum. Affairs Comm’n v. Zeyi Chen*, 430 S.C. 509, 531, 846 S.E.2d 861, 872 (2020) (vagueness); *State v. Legg*, 416 S.C. 9, 14 n.4, 785 S.E.2d 369, 371 n.4 (2016) (facial challenge); *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506–07, 757 S.E.2d 388, 392–93 (2014) (facial challenge). **Court of Appeals:** *Rutter v. City of Columbia Design/Dev. Rev. Comm’n*, 2021 WL 2701549, at *3 (S.C. Ct. App. June 30, 2021) (vagueness). **Circuit Courts:** *Retail Servs. & Sys., Inc. v. S.C. Dep’t of Rev.*, 2014 WL 12692755, at *2 (S.C. Com. Pl., Aiken County, May 29, 2014) (as-applied challenge); *Smith v. SLED*, 2013 WL 8477943, at *11 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) (citing vagueness). **Administrative Law Courts:** *Hyndman v. Charleston County Assessor*, 2013 WL 1786476, at *3 (S.C. Admin. Law Ct. Apr. 18, 2013) (as-applied challenge).

6, 2013). The circuit court decided the question under the dominant factor test rather than under *Chimento*'s "wagering test," even though its order contains a discussion of *Chimento* in the context of a constitutional challenge based on vagueness. *See id.* at *2-3.

Fourth and finally, the Court cannot ignore that the magistrate court's view of *Chimento*, if widely adopted would turn participating in ordinary skill-based games into an illegal activity if a participant merely pays an entry fee and may receive a prize for successful play. The magistrate court's novel "wagering" test utterly disregards the decades-old accepted legality of "paying to play" a predominantly skill game, whether by depositing currency into a video game machine like *Dragon's Ascent* or by paying an entry fee to participate in a local golf tournament. The affected participants would also include not just amateurs participating in local events but also pro athletes who come to South Carolina to participate in nationally known events like the Heritage Classic golf tournament, the Charleston Open women's tennis tournament, and the Darlington 500 NASCAR race. The effect would extend even to state-sponsored events like the Governor's Cup Billfishing Series. The potentially far-reaching consequences of reading *Chimento* as establishing a "wagering" test which applies across the board to all games of skill is a strong basis to question the wisdom of accepting the magistrate court's order *in toto*, especially in light of the other factors discussed above, all of which indicate that the magistrate court read into *Chimento* a holding that simply is not there.

For these reasons, this Court affirms the magistrate court's decision finding that *Dragon's Ascent* is a game predominantly based on skill and reverses the magistrate court's decision to the extent it holds that *Dragon's Ascent*, despite being a game of skill, nevertheless violates S.C. Code Ann. § 12-21-2710 under a novel "wagering" test derived from the Supreme Court's decision in *Chimento*.

IV. CONCLUSION

For the reasons set forth herein, the order of the magistrate court is affirmed in part and reversed in part.

IT IS SO ORDERED.

Hon. Bentley Price, S.C. Circuit Court Judge

Charleston, S. C.

December _____, 2022.



Berkeley Common Pleas

Case Caption: 1 Dragon'S Ascent Video Gaming Machine , plaintiff, et al VS South Carolina Law Enforcement Division (Sled)

Case Number: 2022CP0802026

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

1 Dragon's Ascent Video Gaming Machine;
SC Games of Skill, LLC,

Appellants,

vs.

South Carolina Law Enforcement Division
(SLED),

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2022-CP-08-02026

**ORDER DENYING RESPONDENT'S
MOTION TO ALTER, AMEND, AND
RECONSIDER**

The Respondent, SLED, filed a Motion to Alter, Amend, and Reconsider pursuant to Rule 59, SCRCF, dated March 9, 2023, asking this Court to reconsider its previous Order in this matter and issue a substituted Order affirming the magistrate's decision that the gaming device in question violates South Carolina statute and should be destroyed.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).¹ Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, C/A No. 3:10-1036-

¹ Rule 59 is substantially the same as the Federal Rule. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, “[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does “[a] party’s mere disagreement with the court’s ruling . . . warrant a Rule 59(e) motion.” In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat’l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Respondent’s Motion as well as previous briefing, arguments, and proposed Orders, the Court hereby DENIES Respondent’s Motion to Alter, Amend, and Reconsider.

AND IT IS SO ORDERED.

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Berkeley Common Pleas

Case Caption: 1 Dragon's Ascent Video Gaming Machine , plaintiff, et al VS South Carolina Law Enforcement Division (Sled)

Case Number: 2022CP0802026

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

1 DRAGON'S ASCENT VIDEO GAMING
MACHINE; SC GAMES OF SKILL, LLC,

APPELLANTS

VS.

SOUTH CAROLINA LAW ENFORCEMENT
DIVISION (SLED),

RESPONDENT

COMMON PLEAS CASE NUMBER

2021CV0810602903
MAGISTRATE CIVIL CASE NUMBER

IN THE COURT OF COMMON PLEAS

NOTICE OF CIVIL APPEAL

The defendants in the underlying litigation, 1 Dragon's Ascent Video Gaming Machine and SC Games of Skill, LLC, hereby give notice of appeal from the judgment of the Magistrate's Court in the above action, to the Circuit Court of Common Pleas, in the County of Berkeley.

This notice of appeal is made subsequent to personal notice of the judgment which was received on the 11th day of August, 2022.

The appellants' exceptions to the judgment of the Magistrate are set forth as follows:

1. As a matter of legal error, the trial court considered and applied penal statutes not contained in the Notice of Post-Seizure Hearing to the Defendants.
2. As a matter of legal error, the trial court misapplied the burden of proof.
3. As a matter of legal error, the trial court applied an incorrect legal analysis to determine whether a machine violated South Carolina law.
4. As a matter of legal error, the trial court misinterpreted the applicable South Carolina statutes.
5. As a matter of error, the trial court mischaracterized the machine's operating features.

/s/William Wilkins

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Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

1 Dragon's Ascent Video Gaming Machine;
SC Games of Skill, LLC,

C/A No. 2022-CP-08-02026

OPENING BRIEF

Appellants,

vs.

South Carolina Law Enforcement
Division (SLED),

Respondent.

INTRODUCTION

This is an appeal from a civil *in rem* forfeiture action under S.C. Code Ann. § 12-21-2712, involving a video game called “Dragon’s Ascent” that was the subject of a cooperative seizure by the South Carolina Law Enforcement Division (“SLED” or “the State”). The magistrate court conducted a post-seizure hearing to determine the legality of the machine under S.C. Code Ann. § 12-21-2710. On August 11, 2022, the magistrate court issued an order (the “Order”) finding that skill predominates over chance in determining the outcome for players of Dragon’s Ascent. Under settled precedent, this finding established the legality of Dragon’s Ascent under § 12-21-2710, and no further inquiry was required. Despite this, the magistrate court adopted a novel “wagering” test derived from *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), a Supreme Court decision addressing the evidence required to support a conviction under a different statute, S.C. Code Ann. § 16-19-40, a statute having absolutely no relevance to the issue before the magistrate court.

SC Games of Skill, LLC (“Appellant”),¹ the owner of the Dragon’s Ascent machine, now appeals. Based on overwhelming evidence, the legality of Dragon’s Ascent is established by the magistrate court’s determination, correctly applying the dominant factor test, that skill predominates over chance in determining the outcome of this game. Because the outcome of the game of Dragon’s Ascent is predominantly determined by skill (as opposed to chance), playing this game is by definition *not* gambling.

Contravening settled precedent, the magistrate court then erroneously applied a novel “wagering” test under which it found that Dragon’s Ascent “was used for gambling” under S.C. Code Ann. § 12-21-2710.² Thus, as the magistrate court acknowledged on page 12, its Order rendered illegal numerous “pay to play” events—such as golf and tennis tournaments, NASCAR racing, and numerous other competitions—where players pay an entry fee in order to participate in an event to win a monetary prize for prevailing in a skill-based game.

BACKGROUND

I. Seizure of the Dragon’s Ascent Machine

The Dragon’s Ascent video gaming machine at issue was seized from LG’s By The Creek in Hanahan, South Carolina on November 19, 2021. (Order of Destruction at 1.) The magistrate court initially determined that Dragon’s Ascent is a machine “prohibited pursuant to S.C. Code Ann. § 12-21-2710” and ordered its destruction. (*Id.*) Appellant timely requested a post-seizure hearing. (Letter Requesting Post-Seizure Hearing, Nov. 29, 2021.)

¹ Although the Dragon’s Ascent machine is the actual party in this *in rem* proceeding, for clarity SC Games of Skill will be referred to as “Appellant” herein. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 183 n.1, 525 S.E.2d 872, 876 n.1 (2000).

² It is of no significance regarding the issue before the magistrate court that the machine was not licensed as it should have been.

II. Evidence Presented at Post-Seizure Hearing

The post-seizure hearing was conducted on February 4, 2022.

A. Witnesses

The State called one witness, SLED Special Agent Ryan Wood. (Transcript of Post-Seizure Hearing (“Hr’g Tr.”) 88.) Agent Wood first observed the Dragon’s Ascent machine after receiving a call about it in October 2021. (Hr’g Tr. 89:20-23.) He was not previously familiar with Dragon’s Ascent but played it before and after it was seized. (Hr’g Tr. 90:10-12; *id.* at 91:23-93:13; *id.* at 116:10-12.) Agent Wood did not initially review the help menu of the machine, although he could have accessed it and reviewed the information without inserting any money into the machine. (Hr’g Tr. 129:16-130:21.) Agent Wood subsequently reviewed the information in the help menu. (Hr’g Tr. 111:15-112:5.) Based on what he had learned, when he played Dragon’s Ascent a second time he focused on the color wheel and matching his shot color to the color of the target dragon. (Hr’g Tr. 112:8-23.) The State did not offer Agent Wood as an expert, and the magistrate court did not recognize him as having any relevant expertise.

Appellant called two witnesses, both of whom were qualified without objection as experts. (Hr’g Tr. 26:3-14; *id.* at 154:9-16.) Appellant’s first witness, Nick Farley, has a background in electrical engineering and computer science and for the past 35 years has been engaged in testing and evaluating electronic gaming devices, including as a regulator for the New Jersey Division of Gaming Enforcement. (Hr’g Tr. 19:16-20:7.) Mr. Farley’s business, Eclipse Compliance Testing, is an independent game testing authority that has been approved in more than 250 jurisdictions worldwide. (Hr’g Tr. 24:18-25.) Mr. Farley has been qualified as an expert in the area of evaluating electronic gaming devices more than 50 times in jurisdictions throughout the United States, including testimony in South Carolina on behalf of SLED and the Attorney General’s Office. (Hr’g Tr. 23:10-24:17.) Without objection, the magistrate court recognized Mr. Farley as an expert in

evaluating gaming devices (Hr’g Tr. 26:3-14; *see also* Def. Ex. 1, Tab 3, Nick Farley Curriculum Vitae; Def. Ex. 1, Tab 3, Expert Report of Nick Farley (“Farley Report”).)

Appellant’s second witness, Brock Smith, testified on rebuttal. Mr. Smith has been designing video games for most of his 20-year career. (Hr’g Tr. 152:22-25.) Without objection, the magistrate court recognized Mr. Smith as an expert in the field of computer design and the design of Dragon’s Ascent. (Hr’g Tr. 154:9-16; *see also* Def. Ex. 1, Tab 4, Brock Smith Curriculum Vitae.) Mr. Smith testified regarding the process of developing and designing Dragon’s Ascent and provided an in-court demonstration of the skilled aspects of game play. (Hr’g Tr. 153:4-155:20.)

B. Testimony and Exhibits

The seized Dragon’s Ascent machine was present and operational in the courtroom during the post-seizure hearing. The console is also accurately depicted in a photograph admitted into evidence as Plaintiff’s Exhibit 13. (Hr’g Tr. 125:18-25; Pl. Ex. 13.)

Fundamentally, Dragon’s Ascent is a “point-and-shoot” video game in which the player uses a joystick to aim and a “shoot” button to fire at dragons of varying types, colors, and point values as they move across the screen. (Hr’g Tr. 29:22-31:20; Pl. Exs. 7-9; Farley Report at 3.) Mr. Smith designed and developed Dragon’s Ascent in response to his employer’s request for a game of “100 percent skill—no chance involved.” (Hr’g Tr. 153:6-11.) Working with a staff of 20, Mr. Smith spent approximately five years developing the game. (Hr’g Tr. 153:18-154:7.) Developing the game involved “millions of plays.” (Hr’g Tr. 155:12-20.) At the time of the hearing, Dragon’s Ascent machines were already being played in Florida, Kansas, Nebraska, New York, Texas, and the District of Columbia. (Hr’g Tr. 155:21-156:5.) The Office of the Attorney General of the District of Columbia issued an opinion determining that “[t]he Dragon’s Ascent gaming machine contains *no element of chance*, and is therefore *not a gambling device*.” (Def.

Ex. 1, Tab 1 (emphasis added).)

Game play in Dragon's Ascent occurs according to rules that are established in advance, fully disclosed to the player, and do not change over the course of the game. (Farley Report at 21.) A player³ establishes credits by inserting money into the console and then "uses those credits to engage in gameplay by identifying dragons or creatures as they pass by on the screen and they can fire at those creatures and try to capture them." (Hr'g Tr. 37:15-22.) Each shot has a cost, ranging from a minimum of 10 cents to a maximum of \$2.00. (Hr'g Tr. 92:20-23; *id.* at 128:15-17.) The player decides the cost of each shot and can change the amount at any time. (Hr'g Tr. 92:24-93:3; *id.* at 128:10-24.) Some dragons can be captured with one accurate shot; others can only be captured with several accurate shots. (Hr'g Tr. 127:24-128:1; *id.* at 95:16-20; *see* Farley Report at 13-15.) However, the cost of a shot has no bearing on the number of shots needed to capture a dragon. (Farley Report at 21.) Capturing a dragon results in the prize associated with that dragon being credited to the player. (Hr'g Tr. 31:11-14; *id.* at 81:10-14.)

The player's turret and the shots change colors in a repeating cycle. The number of shots needed to capture a dragon depends upon how closely the color of the "defining shot," the first shot to hit a dragon, matches the color of the dragon. (Hr'g Tr. 53:8-20; *see* Farley Report at 7.) The closer the color match of the defining shot, the fewer shots will be needed to capture that dragon and the higher the player's reward will be. (Hr'g Tr. 57:9-11 ("[T]he color match is very important to how much money you will spend to capture a creature."); *id.* at 167:9-12 ("Q: And you want to maximize your winnings and one of the ways you do it if I'm correct is I match the color with the dragon? A: That's correct."))

³ Players must manually confirm that they are age 18 or older in order to play Dragon's Ascent. (Hr'g Tr. 92:5-7; Farley Report at 3.)

Mr. Smith, who designed Dragon’s Ascent, testified that “the color match is the primary goal of the game. . . . To maximize every shot power no matter what it is, I want to be able to match the color of that dragon as high as possible.” (Hr’g Tr. 166:20-24; *see* Farley Report at 5.)

Capturing a dragon results in a monetary prize (Hr’g Tr. 31:11-14), represented by credits awarded to the player (Hr’g Tr. 79:16-17). The amount of the prize is the “Color Match Value” multiplied by the cost of the shot used to capture a dragon. (Farley Report at 21.) The player succeeds in the game when the prize value of the dragon is greater than the cost of the shots used to capture it. (Hr’g Tr. 31:15-18; *id.* at 31:18-20 (“So ultimately you’d like to try and walk away with a financial gain which is possible because it is all under the player’s control.”).) Success in the game is determined by a player’s ability to observe, track, anticipate, and memorize the dragons’ movements,⁴ gauge the correct timing of when to shoot, and then to shoot accurately. (Hr’g Tr. 167:13-17; *id.* at 168:18-169:1; *id.* at 186:2-9.)

Through his evaluation, Mr. Farley determined that Dragon’s Ascent has no random number generators, no compensating algorithms that might impact a player’s results, and no way to change or manipulate the rewards. (Hr’g Tr. 34:12-24; Farley Report at 21-24.) The game never thwarts the player’s exercise of skill. (Hr’g Tr. 157:1-24.) Thus, a player’s level of skill acquired through observation and memory should increase over time. (Hr’g Tr. 31:15-18 (“Players that become more familiar with [the game] can become successful in that their . . . prize value would exceed the cost to capture the dragon.”); *id.* at 56:2-5; *id.* at 163:14-21; *id.* at 164:11-15; Farley Report at 5, 21, 24 & Appendix B.)

Further evidence that the player’s skill determines the outcome when playing Dragon’s

⁴ The dragons’ movements are not random—each dragon’s flying pattern repeats in a series of scenes over a 35-minute cycle. (Hr’g Tr. 56:2-5; *id.* at 163:14-165:2.)

Ascent was provided through Mr. Smith, who testified that he played the game 16 times in a row and won every time:

Q. Let me ask you, Mr. Smith. Prior to this machine being brought to LG's restaurant ... did you play it?

A. I did.

...

Q. How many times did you play it?

A. 16 consecutive times.

Q. How many times did you play it successfully?

A. I cashed out 16 winning tickets in a row.

(Hr'g Tr. 169:17-170:13.) The printed tickets for these games were admitted into evidence without objection. (Def. Ex. 1, Tab 5.) Mr. Smith played the game four times during the post-seizure hearing, and won every time. (Hr'g Tr. 184:20-186:1; Def. Exs. 201-204.)

Mr. Smith agreed that “people play [Dragon’s Ascent] and make money on a continuous basis.” (Hr'g Tr. 156:9-11.) He further explained:

[L]earning the rules of the game is the biggest part [of success]. Most people will sit and study the instruction manual. They come up with strategies, how to play this thing and they practice a lot.

(Hr'g Tr. 156:13-17.) Similarly, Mr. Farley’s investigation showed:

The outcome is based on the player’s skill and dexterity and their visual hand-eye coordination in an effort to try and identify those creatures and utilize different strategies to try and capture the creatures that they desire and try to win a cash prize.

It’s up to the player to determine whether the accumulation of the cash prize will exceed what they put into the machine or whether it will be the same or less.

...

In our professional opinion we would say this is a game of skill.

(Hr'g Tr. 37:24-38:17; *see also* Def. Ex. 1, Tab 1 (Opinion of D.C. Attorney General.)

III. Magistrate Court's Order

In its Order issued on August 11, 2022, the magistrate court held that a machine is illegal under § 12-21-2710 if it is:

- (1) “a machine (vending, slot, or video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value) for the play of poker, blackjack, keno, lotto, bingo, or craps”;
- (2) “[a] machine or device licensed by the State of South Carolina under S.C. Code § 12-21-2720 and used for gambling”; or
- (3) “[a] device pertaining to games of chance of whatsoever name or kind.”

(Order at 3-4.)⁵ The magistrate court easily rejected (1), holding that “[t]he evidence presented in the instant case with respect to the Dragon’s Ascent machine does not support a finding that the machine was operated for the play of poker, slot machines, blackjack, keno, lotto, bingo, or craps.” (Order at 4.)

The magistrate court turned to the critical question of “whether the Dragon’s Ascent game ... is a game of chance or skill in the context of § 12-21-2710” under the “dominant factor” test identified in Justice Burnett’s dissent in *Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 112, 508 S.E.2d 575, 583 (1998).⁶ (Order at 4.) Based on the evidence and testimony presented at the post-seizure hearing, the magistrate court concluded that Dragon’s Ascent is a game of skill:

[J]ust as with any game of skill, a player may successfully play Dragon’s Ascent using keen hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis. Based on the evidence presented at the hearing, the Court finds that Dragon’s Ascent is a game in which skill predominates over chance.

⁵ The magistrate court also noted that S.C. Code Ann. § 12-22-1040 prohibits a machine that “simulates a bingo or slot machine” but easily concluded that “Dragon’s Ascent does not simulate a bingo or slot machine.” (Order at 4.)

⁶ This test is also sometimes referred to as the “skill v. chance test” or “the predominant factor test.”

(Order at 8.)⁷ This finding established that playing Dragon’s Ascent is not “gaming” or “gambling” and **mandated** a conclusion that the machine is not illegal under (2) or (3). *See S.C. L. Enf’t Div. v. 1-Speedmaster S/N 00218*, 397 S.C. 94, 100, 723 S.E.2d 809, 812 (Ct. App. 2011); *Allendale Cnty. Sheriff’s Off. v. Two Chess Challenge II*, 361 S.C. 581, 583, 606 S.E.2d 471, 472 (2004).

Nevertheless, the magistrate court engaged in further consideration of whether Dragon’s Ascent is illegal under (2), as a machine required to be licensed under S.C. Code Ann. § 12-21-2720 “and used for gambling.”⁸ (Order at 9-12.) According to the magistrate court, § 12-21-2710 “logically prevents the owners of machines ... for the play of a game based entirely in skill, from being used for gambling.” (Order at 9.) Therefore, the magistrate court reasoned, “the key issue” is “whether any machine required to be licensed pursuant to § 12-21-2720 **is used for gambling.**” (Order at 9-10 (emphasis in original).)

To answer this question, the magistrate court disregarded established precedent and looked to *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), even though it acknowledged that *Chimento* “interpreted South Carolina’s ‘statutory’ definition of gambling **in**

⁷ The court appended to this analysis a lengthy footnote noting “that Dragon’s Ascent is a game played predominantly in establishments that serve alcohol” and comparing “the successful play of Dragon’s Ascent to the successful completion of standardized field sobriety tests in the DUI context.” (Order at 8 n.3.) While it does not appear that this discussion impacted the magistrate court’s application of the dominant factor test, it was nevertheless entirely improper. The discussion is based not on evidence presented during the post-seizure hearing but rather on mere speculation.

⁸ It is undisputed that Dragon’s Ascent is required to be licensed under S.C. Code Ann. § 12-21-2720(A)(2), although it mistakenly was not licensed. (Email from Chris Murphy to Hon. Rad Deaton, Aug. 5, 2022.) Moreover, Appellant agrees with the magistrate court that a machine’s legality should not depend upon whether it is actually licensed or merely required to be licensed. (Order at 9.) *See also* S.C. Code Ann. § 12-21-2736 (“The issuance of a license ... does not make lawful the operation of any gambling machine or device, the operation of which is made unlawful under the laws of this State.”); *see also State v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 179, 467 S.E.2d 443, 445 (1996) (“It is clear ... that the Cherry Master is a machine subject to licensing. However, **this licensing requirement in no way affects the legality or illegality** of the Cherry Master.” (emphasis added)).

the context of S.C. Code § 16-19-40.” (Order at 10 (emphasis added).) Despite this, the magistrate court relied upon *Chimento* for the proposition that in *all* circumstances, not just under § 16-19-40, “gambling/gaming depends not on the skill/chance ratio, but rather on the wager.” (Order at 10 (citing *Chimento*, 401 S.C. at 533, 737 S.E.2d at 838).) Based upon this novel “wagering” test, even though the magistrate court held that Dragon’s Ascent was a game of skill, the court concluded that it nevertheless violated § 12-21-2710 because players place wagers and win money, “and ... the amount of money the player stands to win directly correlates to the amount wagered.” (Order at 11.)⁹ Based on this reasoning, the magistrate court concluded:

[A]lthough Dragon’s Ascent *is a game in which skill predominates*, a person “gambles” when money is *wagered* in so playing. To hold otherwise would effectively legalize wagering and payouts for all games of skill, including *golf, basketball, and the like*. The Dragon’s Ascent machine also has several characteristics of gambling devices, including but not limited to the free play feature, the meter which records the amount of points that are redeemed, and the fact that the machine does not give change.

(Order at 12.)¹⁰ The magistrate court therefore held Dragon’s Ascent illegal under § 12-21-2710.

ISSUES ON APPEAL

1. Did the magistrate court err in applying *Chimento* to find Dragon’s Ascent illegal, even though the court found that it is legal under the established dominant factor test?
2. Did the magistrate court err in applying criminal statutes, without notice, in a civil *in rem* proceeding?
3. Did the magistrate court err in finding that Dragon’s Ascent contains a free play feature?

⁹ There is nothing nefarious or hidden about this fact. As Mr. Farley explained in his expert report, the amount awarded for capturing a dragon is determined by a set formula: “(Color Match Value * Shot Cost) = Actual Reward.” (Farley Report at 21.) The “Color Match Value” is also determined by a set formula. (Farley Report at 7.)

¹⁰ In a brief paragraph, the magistrate court also found the Dragon’s Ascent machine illegal under S.C. Code Ann. § 16-19-50, which prohibits *a person* from setting up, keeping, or using “[a] machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes.” Section 16-19-50 is not relevant to this *in rem* proceeding.

STANDARD OF REVIEW

“An action for forfeiture of property is a civil action at law.” *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011) (quoting *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006)). On an appeal of a magistrate court’s judgment:

[T]he appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

S.C. Code Ann. § 18-7-170; *see also* S.C. Code Ann. § 18-7-140 (on appeal from a magistrate judge’s order, the circuit court “shall have the same power over its own determinations, and shall render judgment thereon in the same manner, as the circuit court in actions pending therein, without trial by jury”). “Sections 18-7-140 and 18-7-170 give the Circuit Judge sitting in an appellate capacity the ability to make a determination in the same manner as Circuit Courts in trials without a jury and to reverse a judgment for errors of fact even though the Circuit Judge may not have had the opportunity to observe the demeanor of the witnesses.” *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 234, 312 S.E.2d 20, 21 (Ct. App. 1984); *see Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001) (“Section 18-7-170 provides that on appeal from Magistrate’s Court, the Circuit Court may make its own findings of fact.”).

“Determining the proper interpretation of a statute is a question of law” subject to *de novo* review. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). S.C. Code Ann. § 12-21-2710 is a penal statute and “when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.” *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Moreover “[a]s a general rule, ... forfeitures are not favored in the law or equity.” *Ducworth v. Neely*, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct. App. 1995)

(civil forfeiture action in drug related matter).

ARGUMENT

This Court should reverse the magistrate court’s Order. The only question presented to the magistrate court was whether Dragon’s Ascent is illegal under S.C. Code Ann. § 12-21-2710.¹¹ The magistrate court correctly found that Dragon’s Ascent is a game of skill under the dominant factor test. Under settled precedent, this finding conclusively establishes its legality under S.C. Code Ann. § 12-21-2710—no further analysis was required. Therefore, it was error for the magistrate court to go beyond this and consider whether the machine was illegal under a novel “wagering” test derived from *Chimento*, which involved S.C. Code Ann. § 16-19-40, a criminal statute. Whether a machine is illegal under S.C. Code Ann. § 12-21-2710 is an entirely different question from whether an individual is guilty of a criminal offense by playing a specifically enumerated game in a specifically enumerated place under § 16-19-40.

I. The Magistrate Court Erred in Finding Dragon’s Ascent Illegal Under *Chimento*

The long-settled law of South Carolina is that skill, as opposed to chance, is what distinguishes a legal activity from illegal “gaming” or “gambling.” *See Speedmaster*, 397 S.C. at 99, 723 S.E.2d at 812. Stated another way, an activity that combines consideration, *chance*, and reward is illegal, while an activity that combines consideration, *skill*, and reward is legal. *See id.*

The magistrate court correctly determined, under the dominant factor test, that Dragon’s Ascent is a game of skill. (Order at 8 (“Based on the evidence presented at the hearing, the Court finds that Dragon’s Ascent is a game in which skill predominates over chance.”).) The dominant factor test has long been advocated by SLED, the Plaintiff in this matter. *See Speedmaster*, 397

¹¹ Although S.C. Code Ann. § 12-21-2712 authorizes an order of destruction under § 12-21-2710 “or any other law of this State,” the State sought destruction of the machine only on the basis that it violates § 12-21-2710.

S.C. at 98, 723 S.E.2d at 811 (noting that “SLED advocates the adoption of the ‘dominant factor test’”). This is also the standard advocated by the South Carolina Attorney General. *See* Op. S.C. Atty Gen., 2002 WL 31341812, at *2 (S.C.A.G. Aug. 28, 2002) (“It is the opinion of this Office as well as a majority of jurisdictions in the United States that the ‘Dominant Factor’ test is the appropriate test to determine whether a game is a game of chance.”).

The magistrate court’s analysis should have stopped at this point. The Court of Appeals has squarely held that if skill predominates over chance, no further inquiry is necessary to determine the legality of the machine. *See Speedmaster*, 397 S.C. at 100, 723 S.E.2d at 812. In *Speedmaster*, SLED contended—similar to its argument here—that whether a game is one of chance is a separate question from whether the machine is “used for gambling.” The Court of Appeals flatly rejected any such notion, holding that “the term gambling” as used in § 12-21-2710 “necessarily encompasses the element of chance.” *Id.* Consequently, if a game is not a game of chance, the machine or device **by definition** is **not** “used for gambling.”

Ignoring this settled law, the magistrate court separately considered whether the Dragon’s Ascent machine was “used for gambling” and adopted a novel “wagering” test to perform this analysis. (Order at 10.) The magistrate court purported to derive this test from *Chimento*, citing that case for the proposition that “[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, **but whether there is money or something of value wagered on the game’s outcome.**” (Order at 10 (quoting *Chimento*, 401 S.C. at 533, 737 S.E.2d at 838) (emphasis added).)

The question of a machine’s legality under § 12-21-2710 was not presented in *Chimento*. Rather, the appellants in *Chimento* were convicted of violating S.C. Code Ann. § 16-19-40 by playing “cards” in a “house used as a place of gaming.” In a divided opinion, the Supreme Court

reversed the circuit court order setting aside their convictions. Tracing the history of § 16-19-40, the Supreme Court concluded that this particular statute applied to the playing of certain *specified, enumerated games* (such as cards or dice) in certain *specified, enumerated locations* (such as a kitchen, a barn, or a house used as a place of gaming), regardless of whether they were games of chance or skill. *See id.* at 531, 737 S.E.2d at 836 (“[Section] 16-19-40 criminalizes *the playing of* certain games and gambling.” (emphasis added)).

The majority’s opinion repeatedly makes clear that the Court was construing “gaming” and “gambling” in the specific context of § 16-19-40; *id.* (“The circuit court ... [held] that ‘gaming’ *as used in § 16-19-40* applies only to betting on games of chance[.]” (emphasis added)); *id.* at 532, 737 S.E.2d at 837 (describing issue as “whether ... betting on a card game ... is unlawful gaming” and citing, *inter alia*, § 16-19-40); *id.* (“Under the plain language *of § 16–19–40*, gambling on a game of skill is a violation if that gambling is being done in a prohibited location.” (emphasis added)); *id.* (“A violation *of the gaming prohibition of § 16–19–40* does not depend on whether the particular game involves more skill than chance.” (emphasis added)); *id.* (“[T]here is precedent that indicates *§ 16–19–40 is concerned with wagering* regardless of the skill involved in the game wagered upon.” (emphasis added)); *id.* at 533, 737 S.E.2d at 837 (“We hold that one ‘games’ *within the meaning of § 16-19-40* when money is wagered on Texas Hold’em, even though it is a game in which skill predominates.” (emphasis added)); *id.*

That *Chimento*’s holding is limited to § 16-19-40—and specifically does not apply to § 12-21-2710—becomes even more clear upon review of the concurrence written by Chief Justice Toal and the dissent written by Justice Hearn, joined by Justice Kittredge. In her concurrence, Chief Justice Toal criticized § 16-19-40 as “hopelessly outdated, as it applies to *any* gaming activity (including *all* card games) played in a residential home whether wagering occurs or not.” *Id.* at

538, 737 S.E.2d at 840.

Chief Justice Toal also “agree[d] wholeheartedly” with the dissent’s conclusion that § 16-19-40 is unconstitutionally void for vagueness because it delegates too much discretion to law enforcement to decide whether the statute has been violated. *Id.* at 536, 737 S.E.2d at 839 (Toal, C.J., concurring); *see* 547-552, 737 S.E.2d at 845-847 (Hearn, J., dissenting). She wrote, however, that she joined the majority because “we cannot sever the language, ‘a house used as a place of gaming,’ from section 16-19-40 without striking the provision in its entirety,” which she feared would “open the door wide to *all* heretofore illegal gaming practices in this state, ***including video poker.***” *Id.* at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (second emphasis added).

In her dissent, Justice Hearn explained why Chief Justice Toal’s concern was misplaced:

I cannot comprehend [Chief Justice Toal’s] concern that if any part of the statute is held unconstitutional, a parade of horrors will ensue, including the resurrection of video poker. The prohibition of video poker is found in Section 12–21–2710 of the South Carolina Code (2000). This is a ***completely separate section (and title) of the code*** and makes no reference at all to section 16–19–40. In fact, ***it is entirely independent and separate from the general gambling prohibitions involved here.*** Striking section 16–19–40 in whole or in part would have no impact on section 12-21–2710.

Id. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting) (emphasis added). Notably, the majority opinion did not challenge Justice Hearn on this point. Indeed, § 12-21-2710 is never even cited in the majority opinion.

That *Chimento* does not impact the application of § 12-21-2710 is confirmed by *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam), decided by the same five justices who decided *Chimento* only two years earlier. In *Awde*, the Court unanimously affirmed a magistrate court’s “finding that two ‘Chess Challenge II’ devices before it were legal games of skill.” *Id.* The parties’ briefs raised arguments concerning,

inter alia, the “used for gambling” prong of § 12-21-2710.¹² If the Supreme Court had intended *Chimento* to apply when determining the legality of a machine under § 12-21-2710, it surely would not have issued an affirmance in *Awde*. The fact that the Court affirmed—in an unpublished, per curiam opinion—strongly indicates that the “wagering” test used in *Chimento* does **not** apply to the analysis of whether a game is legal under § 12-21-2710.

By importing *Chimento* into the analysis under § 12-21-2710, the magistrate court improperly **rewrote** the statute to make skill games illegal. *See Consumer Advocate for S.C. v. S.C. Dep’t of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) (“The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy.”). In essence, the magistrate court interpreted § 12-21-2710 to read, “Any games involving wagering are prohibited.” But this interpretation renders virtually all of the language of § 12-21-2710 as “surplusage, or superfluous,” in violation of elementary rules of statutory construction. *State v. Brown*, 436 S.C. 505, 526, 873 S.E.2d 445, 456 (Ct. App. 2022) (“A statute should be so construed that **no** word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” (emphasis added)).

However, it is clearly established and widely accepted throughout the South Carolina legal system that skill v. chance, not “wagering,” is the relevant test:¹³

¹² The briefs and other case materials are available at <https://ctrack.sccourts.org/public/caseView.do?csIID=50448> (last visited Oct. 18, 2022).

¹³ The magistrate court’s reliance (Order at 10-11) on *Speedmaster’s* footnote referencing *Chimento* is grossly misplaced. The *Speedmaster* Court speculated only that the *Chimento* Court might decide whether South Carolina will follow the dominant factor test or the pure chance test. *See Speedmaster*, 397 S.C. at 98, 723 S.E.2d at 811 (“Neither test has been judicially adopted in South Carolina.”). *Speedmaster* was not reversed by *Chimento* – and, indeed, remains controlling precedent. Importantly, gambling’s three elements—“the offering of a prize, for payment of some consideration, with the winner determined by chance”—remain unchanged. *Darlington Theatres, Inc. v. Coker*, 190 S.C. 282, 2 S.E.2d 782 (1939).

- **THE LEGISLATURE:** S.C. Code Ann. § 3-11-100(2) (defining “Gambling” and “gambling device” to mean “any game of chance”); S.C. Code Ann. § 12-21-3920(1) (defining “bingo” or “game” as “a specific game of chance”); S.C. Code Ann. § 37-21-20(5)(a) (defining “prize promotion” as “a sweepstakes or other game of chance”);
- **THE COURT OF APPEALS:** *SCDOR v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) (“[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12–21–2710[.]”);
- **THE CIRCUIT COURTS:** *Smith v. SLED*, 2013 WL 8477943, at *2 (Anderson Cty. Ct. Common Pleas, Nov. 6, 2013) (“[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]”);
- **THE ADMINISTRATIVE LAW COURTS:** *SCDOR v. Chestnut*, 2021 WL 4822858, at *6 (Oct. 8, 2021) (stating that “games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710”); and
- **THE ATTORNEY GENERAL:** Op. S.C. Atty Gen., 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that “South Carolina gambling laws” prohibit “games of chance”).

In addition to being erroneous, if allowed to stand the magistrate court’s “wagering” test could have widespread consequences because it states that all skill-based contests that require an entry fee and offer a prize to the winner, such as golf and tennis tournaments, NASCAR races, and other competitive events are illegal. (Order at 12 (noting that not adopting a “wagering” test “would effectively legalize wagering and payouts for all games of skill, including golf, basketball, and the like.”).) The magistrate court’s application of a novel “wagering” test utterly disregards that “paying to play” a predominantly skill game, such as golf, tennis “and the like,” is an established lawful practice in South Carolina.¹⁴

¹⁴ All of these activities are “pay to play” games, just like Dragon’s Ascent, which require participants to pay money, either in the form of an entry fee or a deposit of coin or currency into a slot, in order to be given the opportunity to play.

- Golf Tournaments:
 - Country club golf tournaments, such as that conducted by the Berkeley County Country Club: <https://www.berkeleycc.com/25-uncategorized/40-invitational-3>;
 - The Heritage Classic Golf Tournament: <https://www.heritageclassicfoundation.com/>;
 - “Closest to the pin”-type contests: *Op. S.C. Atty. Gen.*, 2011 WL 3918174, at *1 (S.C.A.G. Aug. 17, 2011) (stating that a golf promotion with \$5.00 entry fee, where the player who landed a golf ball closest to the pin would win up to \$10,000 “is not violative of South Carolina’s gambling laws” because the outcome was determined by skill);
- Auto Racing:
 - The Southern 500: <https://www.darlingtonraceway.com/events/2022-fall-nascar-race/>; and
- Tennis tournaments:
 - Credit One Charleston Open: <https://www.creditonecharlestonopen.com>.

II. The Magistrate Court Erred in Applying Criminal Statutes, Without Notice, in a Civil Matter

The magistrate court’s order begins with the statement that the matter “comes before the Court ... to determine whether possession of one (1) Dragon’s Ascent Video Gaming Machine violates S.C. Code § 12-21-2710 *or any other law of the State of South Carolina.*” (Order at 1 (emphasis added).) Although S.C. Code Ann. § 12-21-2712 provides for destruction of a machine if it is illegal under § 12-21-2710 “or any other law of the State of South Carolina,” the language “or any other law of the State of South Carolina” is irrelevant. The *only* question is whether Dragon’s Ascent is legal under § 12-21-2710, not any other statute. This is clear from the Order of Destruction/Notice of Post-Seizure Hearing (“Notice”), which states that the Dragon’s Ascent machine was before the court for a determination of whether it was “prohibited pursuant to S.C. Code Ann. § 12-21-2710.” (Notice at 1.) The Notice then sets forth text of § 12-21-2710 and concludes: “I find that the Defendant’s machine(s) are in violation of S.C. Code Ann. §12-21-2710

and do hereby order their destruction.” (*Id.*)

Having seized the Dragon’s Ascent machine and ordered its destruction exclusively on the grounds that it was prohibited under § 12-21-2710, it was manifestly improper for the magistrate court to uphold the forfeiture on the basis of *different* statutes, S.C. Code Ann. §§ 16-19-40 and 16-19-50, that were *never mentioned in the Notice*, in addition to having no relevance to the issue of the legality of Dragon’s Ascent.

Consequently, application of criminal statutes and analyses constitutes reversible error.

III. No Evidence Supports the Magistrate Court’s Finding that Dragon’s Ascent Contains a Free Play Feature

The magistrate court’s conclusion that Dragon’s Ascent is “used for gambling” under its novel “wagering” test also opined that the “Dragon’s Ascent machine also has ... [a] free play feature.” (Order at 12.) This statement was made without any explanation, support, or reference to any evidence or testimony. The evidence presented at the post-seizure hearing, in fact, demonstrates that Dragon’s Ascent *does not* have a free play feature. The magistrate court apparently confused the game’s display of non-credit scoring “free shots” with a “free play feature,” a term that has a specific meaning under South Carolina law.

A. Meaning of “Free Play Feature” Under South Carolina Law

South Carolina law requires licensing of, *inter alia*, “a machine for the playing of amusements or video games, *without free play feature.*” S.C. Code Ann. § 12-21-2720(A)(2) (emphasis added). In Revenue Ruling 16-4, the Department of Revenue provided the following guidance:

A free play feature allows a person to play *an entire game* free of charge where the free game is *the same game the person would play if he had paid to play the game*. For example, a player may receive a free game after a high score or after a number match where the last number of the player’s score matches a number randomly selected by the machine (Score: 328,446, Randomly Selected Number: 6).

Revenue Ruling 16-4, 2016 WL 8794171 (S.C. Dep't of Rev. May 17, 2016) (emphasis added).

B. Testimony Regarding the “Free Shot” Feature of Dragon’s Ascent

All three witnesses at the post-seizure hearing offered testimony related to the “free shot” feature.

Mr. Farley, accepted without objection as an expert in evaluating gaming devices, testified that the “free shots” feature is “just *an entertaining way* to add up to the prize that *the player had previously won* by capturing a dragon that hadn’t been awarded yet.” (Hr’g Tr. 78:13-16.) As he further explained:

A. So a player has captured a dragon and they have been entitled to a prize. That prize has not yet been added to their credit meter.

The game has the ability to present that prize as free shots. The player then will press the shoot button and hit various targets as they go by and doesn’t have to pay attention to a color or anything like that because whatever they hit is going to give them a monetary amount that will ultimately add up to the prize that they became entitled to for the capturing of the dragon previously.

Q. So for those shots the player still has no effect?

A. The player’s skill does have effect. They still have to aim and shoot and the feature will continue until they hit a sufficient quantity of creatures to add up to the prize that they became entitled to.

Q. Okay. But from the player’s perspective that’s just an illusion, correct?

A. You could call it that. I mean, I think the term I used was an entertaining display.

(Hr’g Tr. 79:16-80:13 (emphasis added).)

Mr. Smith, who also testified without objection as an expert, testified:

Q. ... What is a free shot? If this machine says you get a free shot what does that mean?

A. So a free shot is what we would call a bonus. Most video games are some type of power-up players like. It’s exciting for them to get. Technically it’s just another reward, a reward that you’ve already earned,

where on this it's just an entertaining view that *reveals to the player their reward they've already gotten*.

It just hasn't been shown to them yet. So basically *it's a pause in the game. You're still in your current last game*. You shot a dragon. You won the reward.

The reward now need[s] to be displayed to you. It's a fun way for the player to be able to see what they've already won.

(Hr'g Tr. 158:1-17 (emphasis added).) Thus, Mr. Smith—the person who designed Dragon's Ascent—testified that the “free shots” feature *is not a new game* but rather is an entertaining display that appears *within the player's current game*.

Agent Wood, who was not familiar with Dragon's Ascent and had played it only a few times before it was seized, also testified regarding the “free shots” feature. His testimony was not inconsistent with the testimony of Messrs. Farley and Smith, further demonstrating that the “free shots” feature is not “an entire game free of charge.” Agent Wood testified that when the “free shots came up ... I was shooting and *nothing was being deducted from my point – my credit value*.” He continued:

Q. Did you win anything or hit anything on the free shots?

A. Yes.

Q. Okay. You hit some dragons on your free shot. *Did you win any credits from making those hits?*

A. I believe I did.

Q. *Are you sure about that?*

A. *I'm not sure. I'm not completely sure but.*

Q. Indeed the free shot – all that did was just allow you to see on the machine what you had already won? True or false.

A. *I don't recall that. That was – the first I've heard of that was today. Free shots, I saw free shots on the screen when I did play. At that moment I focused on my credit value and my gun. Okay.*

I wanted to see if anything was being deducted. To me if nothing is deducted when I hit the shoot button then I was getting a free shot. That's what was occurring. I was not having any credits being deducted from my total credit value when I selected the shoot button during the free shot mode.

(Hr'g Tr. 148:12-149:11 (emphasis added).)

The testimony of these three witnesses—including two experts, one of whom actually designed and developed Dragon's Ascent—establishes without equivocation that Dragon's Ascent does not have a “free play feature.” A “free play feature” is one that “allows a person to play *an entire game* free of charge.” Revenue Ruling 16-4 (emphasis added). The “free shots” feature of Dragon's Ascent does not meet the definition of the Revenue Ruling because it is merely an interlude within an existing game that provides an entertaining way for previously earned credits to be displayed to the player.¹⁵

Agent Wood accurately observed that “nothing is deducted when I hit the shoot button” when the “free shots” feature is active. (Hr'g Tr. 149:6-7.) But what he failed to understand is that *no* additional credits are earned when a player captures a dragon with a free shot. This is the critical difference between a free *shot* and a free *play*. With a free *play* feature, the player plays a game free of charge (*i.e.*, the player's shots do not cause the player's credits to be deducted to pay for the shot) but may earn *additional* credits by successfully capturing a dragon. By contrast, the “free shot” feature of Dragon's Ascent is only an entertaining display that shows the player the amount of credits *previously* earned—the player earns *no* additional credits when taking free shots even though a dragon may be captured with a free shot.

CONCLUSION

In summary, the magistrate court committed reversible error in:

¹⁵ When most dragons are captured, the credit earned as a result of that capture is immediately displayed. When certain dragons are captured, the “free shots” feature is used to display to the player the credit just earned when that dragon was captured.

1. After making the correct and dispositive finding that “Dragon’s Ascent is a game in which skill predominates over chance” (Order at 8), nevertheless finding the machine illegal under an improper “wagering” test derived from *Chimento*;
2. Applying criminal statute standards, without notice, in a civil matter; and
3. Erroneously finding that the game contains a free play feature.

Accordingly, the Order should be reversed and the machine be deemed lawful.

Respectfully submitted,

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October 24, 2022
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2022-CP-08-02026

1 Dragon’s Ascent Video Gaming Machine;)
SC Games of Skill, LLC,)
)
Appellants,)
)
v.)
)
South Carolina Law Enforcement Division)
(SLED),)
)
Respondent.)

**RESPONDENT’S INITIAL BRIEF
IN SUPPORT OF THE
DESTRUCTION OF AN ILLEGAL
GAMBLING DEVICE**

INTRODUCTION

The trial court in this matter, the Honorable Rad S. Deaton correctly applied South Carolina law in finding that the device at issue is an illegal gambling device. As far back as 1929 the South Carolina Supreme Court acknowledged that a “machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition.” Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) *quoting* 27 C. J. 989. The Magistrate correctly found that the credible evidence presented at trial demonstrated clearly that players can and do **gamble** on this device. SLED Special Agent Ryan Wood, the lead agent on this case, testified that he personally wagered and gambled on this device during each of his three undercover operations at the location in question. Specifically, Wood testified that he “put money in” this Dragon’s Ascent machine, that he “wagered different amounts” during his play, that “the more you wagered the more you stood to win if you were successful destroying that particular dragon”, and that he “sometimes walked away with more money”. (Tr. p. 94). As such, the Magistrate correctly found that the evidence at trial established not only that individuals **can** gamble on this device, but that players **did** in fact gamble on this device.

Notably, the stated “Goal” of the entire game is to, “Shoot dragons to win credits! Credits are redeemable for cash.” (Help Screen). Appellants’ witness Nick Farley specifically acknowledged not only that “the machine is designed to make money and be entertaining”, but also that players “can come out with more money than they came in with”. (Tr. p. 58). To that end, S/A Wood specifically acknowledged:

This -- this game is pretty simple to me. I could put in whatever amount of money I want to put in and I have the chance to win more money than that. That’s gambling to me. If I can put in a dollar and I’m able to win \$20 that’s gambling. I’m also able to lose that. So you’re able to lose or you might win. You’re gambling your money and that is -- to me that’s the point of this game. If there was no chance of winning money at this game I don’t see any entertainment value for bar patrons. I see there’s games all over bars that don’t offer payouts and they’re not getting paid. When I go in a bar and a game is getting played like this and they’re winning money but they’re playing it because they’re – it’s a gambling. Gambling is –well, its addiction, right? So that’s been proven that people have addictions to gambling, but that’s what makes it fun.

(Tr. p. 121).

GAMBLING IN SOUTH CAROLINA

The Magistrate Judge correctly applied decades of legal precedent in South Carolina and acknowledged that the skill/chance distinction **DOES NOT MATTER** for gambling purposes on a device in South Carolina. In 2012, in the landmark case of *Town of Mount Pleasant v. Chimento*, the South Carolina Supreme Court conclusively interpreted South Carolina’s “statutory” definition of gambling and provided binding precedent on this issue. 401 S.C. 522, 737 S.E.2d 830 (2012), *reh’g denied* (Jan. 10, 2013). In *Chimento*, the Supreme Court indicated that the “statutory meaning of the word ‘gambling’ in South Carolina *includes games in which skill outweighs chance.*” *Id.* at 837 (emphasis added). The Court also specifically acknowledged that, “[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game’s outcome.” *Id.* at 838.

Clearly, this interpretation applies to the statutory word “gambling” that exists in S.C. Code Ann. § 12-21-2710. South Carolina law separately prohibits both “device[s] licensed pursuant to Section 12-21-2720 and used for gambling” and “device[s] pertaining to games of chance of whatever name or kind.” However, these are separate and distinct categories of illegality that must be interpreted as such. “[W]e must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,’ for ‘[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.’” Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018). The Appellants incorrectly attempt to combine these separate categories, which would improperly render the word gambling in S.C. Code Ann. § 12-21-2710 superfluous.

In following the precedent set forth in *Chimento*, the Magistrate correctly acknowledged that the determination as to whether this machine is an illegal gambling device does not turn on the relative ration of skill versus chance, rather it turns on existence of a wager. As the Magistrate noted, this device has a “Raise your cost” button that directly facilitates the player’s ability to wager on the device. (Tr. pp. 92-3). Special Agent Wood specifically testified that he “cycled through the raise your shot cost button”, which allowed the player to select his wager between \$.10, .20, .50, 1.00, or 2.00 per shot. (Tr. p. 92). Wood acknowledged specifically that “it was obvious that was some type of wager button.” *Id.* Wood further testified that he was able to continuously wager on the Dragon’s Ascent device and that “the more you wagered the more you stood to win if you were successful destroying that particular dragon.” (Tr. p. 94). Specifically, Wood noted “I noticed that if I was wagering ten cent and selected the small pink dragons going across the screen and was successful destroying it then I would get 60 cents. If I moved my bet to 20 cents I would -- for that same dragon I would get a \$1.20.” (Tr. p. 94).

Ultimately, Special Agent Wood confirmed unequivocally that he “put money in” this Dragon’s Ascent machine, that he “wagered different amounts”, that “the more you wagered the more you stood to win if you were successful destroying that particular dragon”, and that he “sometimes walked away with more money”. (Tr. p. 94). Moreover, Wood testified that he also witnessed other players winning money on the play of this device. (Tr. p. 120). As such, Special Agent Wood’s testimony established that an individual can wager and, thus, gamble on this device rendering it an illegal gambling device prohibited by § 12-21-2710. *See Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), *reh’g denied* (Jan. 10, 2013).

The testimony of Appellants’ witness Brock Smith also demonstrated this point. The Appellants submitted a number of “redemption tickets” from games that Mr. Smith testified to having played and “won”. However, the amounts Smith won on virtually every one of those plays were different ranging from \$20.08 (on \$20.00) to \$99.00 (on \$40.00) (Tr. pp. 170-71). In addition, at trial, Mr. Smith played several games during which his wager amount was different. On one play, he wagered \$2.00 and turned his \$20.00 “in to \$78” with a single shot (Tr. p. 175). However, on two other plays with a smaller wager, his result was turning is \$20.00 into \$20.20. (Tr. p. 176-77). This was the same player playing two games at virtually the same time, employing the same “skill” and “abilities, yet receiving different amounts of money based on the size of the wager involved and the board made available by the machine. Ultimately, this was direct evidence that the size of the wager affects the amount to be won rendering this is an illegal gambling device in South Carolina. The Magistrate ultimately correctly held that the “credible evidence before the Court supports the conclusion that money or something of value is wagered on the outcome of each Dragon’s Ascent ‘play’ and players do so with the expectation of a larger regards upon further play.” (Order pp. 11-12). This is illegal gambling in South Carolina.

HISTORY AND APPLICABILITY SECTION 12-21-2710

As noted above, as far back as 1929 the South Carolina Supreme Court has acknowledged that a “machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition.” Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) *quoting* 27 C. J. 989. The South Carolina Supreme Court has also noted that it “consistently has deferred to the Legislature’s determination of which gaming devices must be sacrificed for the public welfare. Furthermore, forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable.” Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 303-4, 534 S.E.2d 270, 272 (2000) *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005).

S.C. Code Ann. § 12-21-2710 is the South Carolina Legislature’s determination of the types of machines and devices that are illegal to possess or operate in South Carolina. It states:

SECTION 12-21-2710. Types of machines and devices prohibited by law; penalties.

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or **any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value**, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or **device licensed pursuant to Section 12-21-2720 and used for gambling** or any punch board, pull board, or other device **pertaining to games of chance of whatever name or kind**, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.... (emphasis added).

In interpreting this statute, as with all statutes, the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). And the true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The South Carolina Supreme Court acknowledged the true aim and intent in passing § 12-21-2710 in Westside Quik Shop v. Stewart, indicating:

[f]inally in an extra session called by the Governor in June 1999 S.C. Act No. 125 providing for a November referendum to be held statewide to decide the fate of video gaming. Voters would be asked whether cash payouts for video gaming machines should continue to be allowed after June 30, 2000. If voters answered “no,” Part 1 of the Act would become effective July 1, 2000. This part of the Act repeals § 16-19-60, which allows nonmachine cash payouts, **and amends S.C. Code Ann. § 12-21-2710 (2000) to remove the exception for video gaming machines, thereby rendering the possession of these machines illegal...** Further, under S.C. Code Ann. § 12-21-2712 (2000), these machines are then subject to forfeiture and destruction by the State... Before the referendum was held, an action was brought challenging its constitutionality. After taking the case in our original jurisdiction in October 1999, this Court struck down the referendum, but severed it from the remaining parts of the Act. Specifically, we found Part I, which bans the possession or operation of these machines, to be a free standing legislative enactment and therefore valid. Joytime Distrib. and Amusement Co. v. State, 338 S.C. 364, 528 S.E.2d 647 (1999). **Accordingly, on July 1, [2000] under § 12-21-2710 and -2712, these machines will become contraband subject to forfeiture and destruction regardless of their use or operability.**

341 S.C. 297, 301-2, 534 S.E.2d 270, 272 (2000). (emphasis added).

The Supreme Court has also indicated that

The plain language of the statute makes clear the legislature’s intent to outlaw mere possession of such machines. The statute makes it unlawful “for any person to keep on his premises *or* operate” certain gambling machines. S.C.Code Ann. § 12–21–2710 (Supp.1998) (emphasis added); *see also* State v. Appley, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a machine is a violation in itself, separate from the crime of operation). **The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.**

338 S.C. at 187-89, 525 S.E.2d at 878-79 (2000) (emphasis added). As such, the mere capability that players can gamble on this device renders it illegal in South Carolina. In this matter, this credible evidence demonstrated not only a mere capability, but actual gambling on the device.

The appellants would have this Court construe S.C. Code Ann. § 12-21-2710 to allow individuals to gamble on the device so long as a game’s designer or an expert witness was capable of “winning” some nominal amount on the device every time. This would essentially nullify the word gambling in S.C. Code Ann. § 12-21-2710 and result in the judicial legalization of gambling on devices in South Carolina. This is a manifestly absurd result that flies in the face of the clear intent of the South Carolina Legislature. South Carolina law clearly prohibits the “mere possession” of machines on which individuals can gamble – like this Dragon’s Ascent machine. State v. 192 Coin-Operated Video Game Machines, 338 S.C. at 188–89. As such, the Magistrate correctly rejected this argument finding that “although Dragon’s Ascent is a game in which skill predominates, a person ‘gambles’ when money is wagered in so playing. To hold otherwise would effectively legalize wagering and payouts for all games of skill, including golf, basketball, and the like.” (Order p. 12). In addition, the Magistrate correctly noted that “while Dragon’s Ascent is a game that requires a high degree of skill to master its complexities, the Court believes it is a game designed to make money for the “house,” not the payer, in the context of regular game play, and brings with it the dire concerns referenced by Chief Justice Toal in her concurring opinion in *Chimento, infra*.” (Order p. 8 fn. 3). As noted by the Supreme Court, “[i]n construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.” Lancaster Cty. Bar Ass’n v. S.C. Comm’n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008). Thus, the Magistrate’s rejection of the absurd result of the judicial legalization of gambling should be affirmed.

ACTUAL PRACTICAL OPERATION OF THE DEVICE

In South Carolina, the true test for determining the legality of a device comes from viewing the device as it is played and as it is capable of being played by ALL potential players – not just technical experts. To that end, this Court must consider this device as it can be played by players of all educational levels and gaming backgrounds – or the lack thereof. It is axiomatic that this device is capable of being played by the illiterate, uneducated, and unsophisticated. Therefore, this device must be analyzed in this specific context. This accords with the South Carolina Supreme Court’s mandate “not to inquire into the theoretical possibilities of the scheme, but to examine it in actual practical operation.” Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782, 787 (1939).

In considering this actual practical operation standard, it is noteworthy that the Appellants offered no testimony or evidence whatsoever at trial from any witness who ever actually witnessed anyone playing this machine in LG’s By the Creek. Nor did the Appellants offer any testimony or evidence from any witness who had ever even been to this location. (Tr. pp. 40, 57, 85). Specifically, defense expert Nick Farley acknowledged that he had “never been to LG’s by the Creek”, that he had “not seen patrons at LG’s by the Creek play”, and that he had “not observed patrons play the game.” (Tr. p. 40). Rather, the Appellants would have the Court view this machine in the isolation of its capabilities as played only by a technical expert witness and the game’s designer – not how it is actually played by the machine’s target audience – restaurant and bar patrons. However, this Court cannot so limit its analysis. Rather, this device must be analyzed through the perspective of all actual potential players for the location in question – regardless of their literacy level, education level, skill level, or gaming background.

To that end, at trial, SLED offered the testimony of Special Agent Wood who personally went to LG's By the Creek and not only played this machine in this location, but also witnessed others playing this device at this location. (Tr. p. 120). In truth, Special Agent (S/A) Wood is more representative of an actual player in this location than either of the defense witnesses because S/A Wood's testimony demonstrates actual play on this machine in LG's By the Creek. In that regard, S/A Wood testified that when he played the machine the first time, he did not "see" or "read" any rules or learn of the existence of the "Help Screen" prior to his initial play session on the device. (Tr. p. 90). Rather, S/A Wood testified that he inserted money into the machine, familiarized himself with the buttons on the console, and began playing by shooting at a dragon on the screen. (Tr. pp. 91-2). During this "real-world" actual game play, Wood testified that his results were "totally random and based on what the machine itself wanted to do at any particular time during the game. I employed the same strategies as I played, shot at the same dragons on purpose the same amount of times because -- and different -- I got different results each time." (Tr. p. 108). From Wood's perspective, any skill he tried to use was "eliminated by the computer itself" and that the computer controlled the outcome of his play more than he did. (Tr. p. 109).

Notably, reading the "Help Screen" is certainly not an actual pre-requisite for play. Rather, the only pre-requisite is the insertion of money into the device and signaling that the player is over 18. (Tr. p. 174). It is similarly obvious that players may not have the education level sufficient to read the "Help Screen" much less comprehend these rules or apply them judiciously. Players may also simply ignore the existence of the rules choosing instead to "point and shoot" at dragons for the chance to win money – just like S/A Wood did at times. (Tr. p. 93). Accordingly, any capability of the device that requires comprehension of the "Help Screen" has no bearing on the outcome in this matter.

Further, despite not reading the “Help Screen”, S/A Wood testified that he was able to wager on this device. He testified that he “cycled through the raise your shot cost button”, which allowed the player to select his wager between \$.10, .20, .50, 1.00, or 2.00 per shot. (Tr. p. 92). Wood acknowledged specifically that “it was obvious that was some type of wager button.” *Id.* He testified specifically that he wagered “ten cent first. Then I took the joystick -- moved the joystick around. I noticed the gun moved around with the joystick. I then moved the joystick, hit the shoot button. I shot it. A projectile came out of the gun. I struck a dragon on the screen and nothing happened except for that ten cents was deducted from my total value of \$20. So at that point I was down to \$19.90.” (Tr. p. 93). S/A Wood further testified that he was able to continuously wager on the Dragon’s Ascent device and that “the more you wagered the more you stood to win if you were successful destroying that particular dragon.” (Tr. p. 94). Specifically, Wood noted “I noticed that if I was wagering ten cent and selected the small pink dragons going across the screen and was successful destroying it then I would get 60 cents. If I moved my bet to 20 cents I would -- for that same dragon I would get a \$1.20.” (Tr. p. 94).

In addition, while admitting that he did not hit every dragon he aimed at, Wood acknowledged that when he hit one “you could win or you may not win” and successfully hitting dragons *did not* result in capturing dragons every time. *Id.* Specifically, Wood noted, “[i]f I was successful in shooting or capturing it with four shots the first time and I did the same thing the second time and shot four shots it may not die then. It may have died on the third shot time this time or it may have taken 16 shots. There was just no way to know how many shots it took to kill that particular type of dragon.” (Tr. p. 103). Ultimately, Wood acknowledged that he “never had any idea how many shots it took to destroy any type of dragon.” (Tr. p. 101). When played by a South Carolina bar patron, this clearly is a gambling device in violation of South Carolina law.

Wood also acknowledged an instance where he intentionally tried to lose to deplete his winnings after a printer malfunction. He noted:

I started hitting the shoot button just to get rid of the money real quick. It was going down. Then I noticed all of a sudden I won money from shooting something off the screen. So the bullets would go off the screen. Something -- it was hitting some dragon and I was getting awarded money. So I actually made money when I was trying to lose on purpose. Then eventually I was able to lose all the money back to zero.

(Tr. p. 108). Wood further testified that he went to LG's By the Creek a second time in an undercover capacity to play the Dragon's Ascent device. However, having played once before did not affect the outcome of his play. Rather, when asked if he was more skillful during his second play, Wood answered:

I wouldn't say skillful at all. I would say I -- now, after you play the game you're obviously going to see different dragons and you're going to -- and if you play it long enough you're going to see the different boards. So you will see that. But as for the way I played I played the exact same way. ...

It's basically the same results. Fluctuation in winnings and losing, nothing based on the way I was playing. I -- if I won I would try to do the exact same thing the next time and I wouldn't win.

(Tr. p. 109). S/A Wood also testified that he employed different play strategies to no avail. During his third undercover operation, Wood noted:

The third time I tried to go through each scenario again. I mean, I'm there to play the game and to -- and to really look at it. So I did the single-shot mode whereas you're aiming and shooting. I did the lock-on mode again. I then set the gun, aimed just at the middle of the screen and turned my head and shot --... -- with my eyes closed basically. ...

I won in every scenario. I lost in every scenario. Nothing, I mean, definitive. I employed the same strategies just like I had done before. If I was able to shoot a particular color dragon I would look for that same dragon again, employ the same strategy and get different outcomes.

(Tr. p. 114-5).

S/A Wood testified that he had played this device “at least eight hours” in total and that, although he employed similar skill during these hours of play, he did not get the same results with each play. (Tr. p. 119). Specifically, Wood noted:

I wanted to use all the strategies and see if I got a different outcome by using this strategy versus this strategy. So I did the single-shot mode. It’s not a care in the world of color matching at all. Just shooting, aiming at something and shooting it. Every type of dragon was on the screen.

I then used that same single-shot mode and I would pick out a certain dragon, shoot it until I destroyed it. I would take -- I would note how many times it might take. It took five times to shoot the green dragon. I would then do that again. That same dragon would come back on the screen. I would shoot again. It might take 10 times or might take 15 times before I was able to destroy it again.

S/A Wood also acknowledged:

This -- this game is pretty simple to me. I could put in whatever amount of money I want to put in and I have the chance to win more money than that. That’s gambling to me. If I can put in a dollar and I’m able to win \$20 that’s gambling. I’m also able to lose that. So you’re able to lose or you might win. You’re gambling your money and that is -- to me that’s the point of this game. If there was no chance of winning money at this game I don’t see any entertainment value for bar patrons. I see there’s games all over bars that don’t offer payouts and they’re not getting paid. When I go in a bar and a game is getting played like this and they’re winning money but they’re playing it because they’re -- it’s a gambling. Gambling is --well, its addiction, right? So that’s been proven that people have addictions to gambling, but that’s what makes it fun.

(Tr. p. 121).

Ultimately, S/A Wood confirmed unequivocally that he “put money in” this Dragon’s Ascent machine, that he “wagered different amounts”, that “the more you wagered the more you stood to win if you were successful destroying that particular dragon”, and that he “sometimes walked away with more money”. (Tr. p. 94). Moreover, Wood testified that he also witnessed other players winning money on the play of this device. (Tr. p. 120). As such, Special Agent Wood’s testimony establishes that an individual can gamble on this device rendering it an illegal gambling device prohibited by § 12-21-2710. As such, the Magistrate should be affirmed.

GAMBLING FEATURES AND FREE PLAY FEATURE ON THIS DEVICE

As the Magistrate Judge ultimately noted, this device has the features indicative of a traditional gambling device. The “Rainbow Dragon” progressive jackpot function, the hard meters, and devices lack capability to dispense change are precisely that. The testimony in this case established that the “prize” available for capturing the “Rainbow Dragon” is presented on the screen as a specific dollar amount. In fact, this is the only visible amount a player can see on the screen. In addition, it is undisputed that this amount increases progressively based on “all shots fired by all players and a percentage of all shots fired directly at the dragon.” (Farley Report p. 18). S/A Wood testified that the amount for the Rainbow Dragon during his first operation was “\$614.” (Tr. p. 96). During his second, the amount was in the “\$700 range”. (Tr. p. 110). During his final time, the amount was “\$1,555.41”. (Tr. p. 115). In court, the amount of the Rainbow Dragon was “1,783”. (Tr. p. 52).

Moreover, the evidence demonstrated that a player’s ability to win this jackpot on this device varies randomly based on prior plays by prior players. To that end, Nick Farley indicated that “[a]ny player that walks up there may not know how many shots may have already hit that dragon and what its health may be.” (Tr. p. 63). Further, Farley indicated that “any subsequent shots, whether it’s by the same player or different player, will continue to deplete the health of a dragon.” (Tr. p. 64). As such, every individual player’s ability to win the jackpot is contingent on random number of players that have played this device prior to that date and how successful (or unsuccessful) those prior players may have been in depleting the health of the Rainbow Dragon. This would mean that this random figure (number of prior players and number of prior play) affects not only to the value of the maximum prize, but the number of shots it takes to win that prize.

Interestingly, when directly asked the number of shots it would take to capture the Rainbow Dragon, Nick Farley answered as follows:

I don't know. I don't have that answer. I don't have that formula readily available. I know that the color of the number of the prize indicates the percentage of the overall prize that will be awarded which then determines how many – how many direct color match shots it would take to win the prize and the color match is important because if you don't exactly match the color you don't get the full strength of a shot. You get – you may only get a partial strength of a shot which means it will take more shots to deplete the health of the dragon and capture it.

(Tr. pp. 53-4). When asked how many shots it would take to win the approximately \$700 available during one of S/A Wood's undercover plays, Farley answered "I don't know that answer." (Tr. p. 54). When asked how many shots it would take to win the "1,783" visible on the date of the hearing, Farley answered "I'm not certain." (Tr. p. 54). If the defense's own expert witness, with 35 years of experience in the industry, can't say how many shots it will take to capture the Rainbow Dragon, it is unrealistic to believe that any bar patron at LG's By the Creek would be able to calculate this amount.

Moreover, Mr. Farley acknowledged that a player would have to have "sufficient education to do the math that would be required", and that it would take "calculations" and "multiplication to do that." (Tr. p. 66-7). However, S/A Wood who has a college degree, testified that he had no way of knowing how many shots it would take to capture any of the dragons on the screen or what he stood to win if he did capture one. (Tr. p. 93). He also testified that he could not ascertain the value of any of the dragons he saw on the initial screen he played, and that he had no way of knowing which screens or which dragons would be coming at any subsequent time. (Tr. p. 91). As a result, Wood testified that the outcome of his play was "totally random and based on what the machine itself wanted to do at any particular time during the game." (Tr. p. 108).

Moreover, the device has hard meters whose only function is to track the money taken in versus the money paid out. Nick Farley specifically acknowledged that the machine has “meters to track how much money has been inserted and how much money has been redeemed.” (Tr. p. 58).

The “free play” functionality of this device is also problematic. Since the 1999 amendments, South Carolina law prohibits all video game machines with a free play feature operated by a slot in which is deposited a coin or thing of value. *See* S.C. Code Ann. § 12-21-2710; Westside Quik Shop v. Stewart, 341 S.C. 297, 301-2, 534 S.E.2d 270, 272 (2000) *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005). The “Help Screen” on this Dragon’s Ascent device specifically advertises “Free Shots” to players. (Help Screen). In fact, this screen specifically indicates that “Capturing this dragon rewards free shots” and that “Free shots will capture multiple dragons for a limited time when accurately aimed and timely fired”. *Id.* Mr. Farley acknowledged this by stating “[t]his device has the capability of taking a prize that was earned by a patron that had not been awarded and presenting it to the player in a form that appears they have free plays.” (Tr. p. 78). Farley further testified that “a player has captured a dragon and they have been entitled to a prize. That prize has not yet been added to their credit meter. The game has the ability to present that prize as free shots.” (Tr. p. 79). This free play functionality - standing alone - renders this device illegal in South Carolina. *See* S.C. Code Ann. § 12-21-2710. The Magistrate Judge correctly acknowledged that this device contains all of the hallmarks of gambling characteristics also noting that this device does not provide change. (Order p. 12).

In addition, the fact that certain players can win something on single shots every time is ultimately of no consequence. There are only three “One Shot Captures” or “One-Shot Dragons” in the entire game. (Farley Report p. 13). These dragons are not available at all times during play. This means that most of the dragons on the screen at virtually all times require more than one shot, which requires a player to commit more money to “win”. For a player who has not read the rules – like S/A Wood during his first play – the player may never know of the existence of these dragons. (Tr. p. 90). As such, because this device can be played without a player ever knowing of the existence of one-shot dragons, their existence is not determinative to the analysis.

Moreover, from a realistic player’s perspective, the device’s algorithm ultimately dictates the outcome of each and every single play on this machine. Simply put, the overall maximum possible outcome of each play is set by the machine before any player takes any action of any kind. Further, a player’s knowledge, skill, dexterity, or abilities absolutely cannot improve the overall result because this is entirely controlled by the algorithm of the machine.

The evidence at trial showed that successfully shooting dragons does not always result in capture. Rather, a player can play successfully – can select, target, and correctly “hit” a dragon without capturing it. Successful play in this instance does not equal winning money. Moreover, a non-expert player cannot know how many successful “hits” it will take to successfully capture a dragon at any given time – often rendering multiple successful “hits” on dragons unsuccessful. Even further, successfully capturing identical dragons can result in different returns to the player. In that regard, a player can target two identical dragons, employ the same “skill”, deploy the same number of “shots”, and receive a different result determined entirely at random by the machine. Similarly, two players employing the same “strategy” using the same “skill” and hitting identical dragons will achieve different results.

Further, not all prizes are available at all times and players cannot truly know what prizes may be available at any given time. As such, the total amount that a player can win on any individual shot or any individual board is entirely contingent on the board offered by the machine's algorithm, which, from an unsophisticated player's perspective, appears to be random. Simply put, when an unskilled or unsophisticated player walks up to the machine for the first time, every board selection appears random from the player's perspective. Further, even if a player can somehow anticipate what may be available on a future board, this is ultimately irrelevant. The South Carolina Supreme Court has indicated that it **"is also generally held that, even if the machine indicates in advance exactly what it will dispense, it is none the less obnoxious to the law, for the reason that the player does not gamble upon the immediate returns for the coin deposited but on the chance that a profit will be shown on the next play."** Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) (emphasis added).

In addition, on each and every play, this machine is designed such that the higher valued targets the machine has made available are not truly available unless the player wagers a high enough amount to destroy them. If a player can only win by paying a certain amount of money, the player's skill is ultimately irrelevant. In addition, this machine has a "Lock On" setting whereby the machine itself will randomly target items for the player, thus removing any true "skill" needed to play and win. The deployment of this feature removes player control over which target the machine selects from similarly situated targets that may be on the screen. In this setting, the player cannot select between similarly situated dragons because the machine unilaterally selects between the first available targets. However, even when utilizing this setting, the player still has no way of discerning how many shots it will take to capture any individual dragon or what the worth of that dragon will ultimately be.

CONTRABAND *PER SE*

The South Carolina Supreme Court has also ruled, on several occasions, that video gaming machines, like the machine at issue in this action, are contraband *per se* and thus illegal to possess regardless of its use or capability. This issue was specifically addressed in State v. 192 Coin-Operated Video Game Machines, in which the Supreme Court acknowledged, “[t]he State asserts the machines are contraband *per se*, such that their possession, without more, constitutes a violation. Appellant asserts that coin-operated video games are not inherently illegal, so the machines are therefore only derivative contraband. We conclude the machines are contraband *per se*.” 338 S.C. 176, 189, 525 S.E.2d 872, 879 (2000). The Court went on further to articulate that “[t]hese illegal gambling machines cannot be considered derivative contraband because they are themselves the subject of the statute’s prohibition. In light of the statute’s clear proscription of mere possession of the machines, the machines are clearly contraband *per se*.” *Id.* (internal citations omitted).

The South Carolina Supreme Court addressed this issue again in 2005 in the Mims case. Mims Amusement Co. v. S. Carolina Law Enforcement Div., 366 S.C. 141, 621 S.E.2d 344 (2005). In Mims, the Court articulated that the “controlling question we must answer, then, is whether a video gaming machine—at the moment of seizure—is an item of contraband *per se* or derivative contraband. Is the unexamined machine more like a roulette wheel or an automobile? If it is the former, a claimant has no right to a jury trial; if it is the latter, a claimant has a right to a jury trial.” *Id.* at 153. The Court held as follows: “[w]e conclude, based on our precedent addressing an owner’s right to adequate due process in the forfeiture of a machine and the statutory regulation of the video gaming business, that a video gaming machine constitutes contraband *per se* at the moment it is seized by authorities.” *Id.* The Court went further to state that,

[i]t is apparent, however, that an allegedly illegal video gaming machine is deemed an unlawful gambling device at the moment of seizure, *i.e.*, the machine is contraband *per se* because it is illegal to possess and not susceptible of ownership. Moreover, this conclusion is appropriate in light of South Carolina’s long-established statutory prohibitions on the ownership or use of specified gambling devices, including video gambling devices developed in recent years. *See Johnson [v. Collins Entertainment Co.]*, 88 F.Supp.2d [499]...502 n. 1 [D.S.C. 1999]] (“[l]egislation designed to control ‘the mischiefs of gambling’ was enacted by the South Carolina colonial legislature in 1712”).

Id. at 154. Ultimately, the Court found, “[a]ccordingly, we conclude that a seized video gaming machine constitutes contraband *per se* in the nature of a roulette wheel, and is not in the nature of derivative contraband such as a vehicle or parcel of real property normally used for lawful purposes.” *Id.* As such, the gambling and gaming device at issue in this action is contraband *per se* and is illegal to possess regardless of its intended, capable, or other possible uses.

It is also noteworthy that the functionality of this device also preys on the addictive nature of gaming machines. The “high” and “stimulus” a player feels when successfully capturing a dragon and collecting money – pursuant to which lights flash, a whimsical “diddy” plays, and coins fly across the screen and go into the player’s account – is what keeps players playing. That and, of course, the chance to win money. Even if and when the player loses all of his or her money on all previous shots, the chance to “win big” and “hit the jackpot” is undeniably what keeps players’ playing. Unfortunately, this addictive component is what pushed the South Carolina Legislature to outlaw video poker, all gambling devices, all devices pertaining to games of chance of whatever name or kind, and all devices with a free play feature back in 2000.

If the South Carolina Legislature intends to legalize gambling of “games of skill”, it is certainly free to do so. In fact, House Bill 4521, which was filed by House Minority Leader Rutherford on November 11, 2021, would do exactly that. However, until this or some similar bill is signed into law, all gambling devices remain prohibited in South Carolina.

SCOPE OF REVIEW AND ISSUE PRESERVATION

An appellant, “within thirty days after written notice of judgment has been given him or his attorney by the magistrate, recorder, or judgment of the municipal court, except when the judgment is announced at the trial in the presence of the appellant or his attorney then no written notice is necessary, shall serve a notice of appeal, stating the grounds upon which the appeal is founded.” S.C. Code § 18-7-20. “In the notice of appeal, the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him” S.C. Code § 18-7-30.

“Upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all of the parties and for errors of law or fact.” S.C. Code § 18-7-170.

However, the “circuit court is restricted regarding which issues it may entertain in determining whether a judgment should be affirmed or reversed, either in whole or in part. The circuit court, acting as an appellate court in a case heard by the magistrate, cannot consider questions that have not been presented to the magistrate.” Indigo Assocs. v. Ryan Inv. Co., 314 S.C. 519, 523, 431 S.E.2d 271, 273 (Ct. App. 1993). “Also, the parties to an appeal from the magistrate court are restricted to the theory on which the case was tried in the magistrate court.” *Id. citing* 51 C.J.S. *Justices of the Peace* § 141, at 299 (1967); White v. Livingston, 231 S.C. 301, 306, 98 S.E.2d 534, 537 (1957) (“It is well settled that one cannot present and try his case on one theory and thereafter advocate another theory on appeal.”). “At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.” Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

The Notice of Appeal and initial brief contain issues and theories that were not presented at the trial of this matter. As such, those issues and arguments cannot be considered on appeal. Specifically, the Appellants made no reference to any misapplication of the burden of proof at trial and cannot raise that issue for the first time on appeal. *Id.* Nevertheless, this argument is simply wrong in any event. In South Carolina, the burden of proof is clear, “[a]t a post-seizure hearing, the burden is on the owner of the *res* [the seized gambling device] to show why the seized property should not be forfeited and destroyed.” Union County Sheriff’s Office v. Henderson, 395 S.C. 516, 719 S.E.2d 665, 666 (2011) *citing* State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). The Magistrate Judge correctly applied the burden and correct held that the device is question is a gambling device that is prohibited in South Carolina.

Further, it appears that the Appellants have proffered new arguments in their “Opening Brief” that were not raised at the trial court, much less raised with sufficient specificity. Based on the above, the Respondent asserts that the Appellants’ arguments are unavailing in any event. Nevertheless, “[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). “Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector.” *Id.* As such, any argument that was not sufficient raised with specificity at the trial court must fail on appeal.

CONCLUSION

Based on the foregoing and all applicable South Carolina law and jurisprudence, when analyzing the true nature, use, and overall capabilities of the Dragon's Ascent device at issue in this action; it is unquestionably an illegal gambling device prohibited by § 12-21-2710; Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) *quoting* 27 C. J. 989 (a "machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition."); Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012), *reh'g denied* (Jan. 10, 2013). The evidence and testimony presented at trial clearly indicated that individuals who insert money into this machine can walk away with more than what they started with. This fact is not and was never in dispute in this matter. It is also clear that this machine was designed specifically to attract players who want to gamble and try to win money. That's the point of this type of device – to make money from players who want to gamble for the chance to win cash prizes – like the "1,783" amount of the Rainbow Dragon at trial.

The South Carolina Supreme Court has also long acknowledged that,

[i]n no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions.

Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 69 (1929). Undoubtedly, this device was designed specifically to afford the defense its technical "expert driven" legal arguments in this case. However, when viewing the actual practical operation of this device by its target audience – patrons of LG's By the Creek in Hanahan, South Carolina – its illegality as a gambling device is clear and unequivocal. Accordingly, the trial court's decision should be affirmed.

Respectfully submitted,

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ATTORNEY FOR THE RESPONDENT

Columbia, South Carolina
November 18, 2022

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

1 Dragon’s Ascent Video Gaming Machine;
SC Games of Skill, LLC,

C/A No. 2022-CP-08-02026

ORDER

Appellants,

vs.

South Carolina Law Enforcement
Division (SLED),

Respondent.

This matter is before me on appeal from an August 11, 2022 order of the magistrate court (the “magistrate court order”) holding that a “Dragon’s Ascent” video machine owned by Appellant SC Games of Skill, LLC, is illegal under S.C. Code Ann. § 12-21-2710 and must be destroyed pursuant to S.C. Code Ann. § 12-21-2712. Based on a detailed recitation of the testimony and evidence presented at a lengthy post-seizure hearing, the magistrate court correctly found that Dragon’s Ascent is a game of skill, *i.e.*, that skill predominates over chance in determining the outcome. (Order, at 4-8.) This holding was not appealed by Respondent State Law Enforcement Division (“SLED”), and accordingly it is the law of the case. In addition, I agree with the magistrate court order as to this finding.

Despite finding that Dragon’s Ascent is a game of skill, the magistrate court nevertheless held that the machine violates S.C. Code Ann. § 12-21-2710 according to *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), which involved a completely different statute, S.C. Code Ann. § 16-19-40. The magistrate court interpreted *Chimento* as abandoning the longstanding “skill vs. chance” test applicable under § 12-21-2710 and adopting a novel

“wagering” test, under which any consideration paid to participate in any game constitutes illegal gambling, regardless of the degree of skill involved. (Order, at 10-13.) Applying this “wagering” test, the magistrate court concluded that “although Dragon’s Ascent is a game in which skill predominates, a person ‘gambles’ when money is wagered in so playing,” and therefore the machine violates § 12-21-2710. (Order at 11.) Appellant appeals this ruling, arguing that the traditional multiple-decades-old definition of gambling is payment of something of value, to participate in a game based on chance, to win a prize. *Ward v. West*, 387 S.C. 268, 692 S.E.2d 516 (2010).¹

For the reasons set forth herein, this Court agrees with Appellants that the magistrate court misapplied *Chimento* and that the determination of legality under § 12-21-2710 begins and ends with the skill vs. chance inquiry. Conversely, in order to affirm, this Court would have to accept or ignore all of the following untenable propositions:

- That in deciding *Chimento*, the Supreme Court silently overruled decades of precedent recognizing the legality of skill games in this State without clearly stating it was doing so, contrary to its consistent practice of explicitly announcing that it is overruling prior decisions when it intended an opinion to do so;
- That the *Chimento* opinion repeatedly stated that it was solely concerned with interpreting and applying S.C. Code Ann. § 16-19-40—which is completely irrelevant to post-seizure hearings under § 12-21-2710—can simply be ignored;
- That this Court should also disregard multiple post-*Chimento* rulings and decisions from various South Carolina courts, including a per curiam opinion by the same five justices who decided *Chimento*, applying the long-established “skill vs. chance” test to determine legality of a video game under § 12-21-2710; and
- That the interpretation of *Chimento* by the magistrate court is correct even though it would make it illegal for any person in this state to pay, in one

¹ This unanimous decision of the Supreme Court in *Ward*, decided two years before *Chimento*, repeated this long-recognized definition of gambling as containing three elements—consideration, chance and reward.

way or another, to participate in a skill-based game for a prize—activities that encompass everything from local spelling bees, to nationally renowned events like the Heritage Golf Tournament at Hilton Head, and even state-sponsored events like the Governor’s Cup fishing tournament.

Accordingly, this Court reverses the magistrate court’s adoption of a novel “wagering” test from *Chimento* and its application of that test to find Dragon’s Ascent is illegal.

I. BACKGROUND

On November 19, 2021 a Dragon’s Ascent video machine was seized from a business called LG’s By The Creek, located at 1005 Tanner Ford Boulevard, Hanahan, South Carolina. After examining the machine, the magistrate court made a preliminary finding that it was an illegal gambling device under S.C. Code Ann. § 12-21-2710 and ordered its destruction pursuant to S.C. Code Ann. § 12-21-2712. After Appellant requested a post-seizure hearing, one was held on February 4, 2022.

The testimony and evidence at this post-seizure hearing established that Dragon’s Ascent is an aim-and-shoot video game in which the player attempts to capture dragons of varying sizes, colors, and point values as they move across a screen. To begin playing, the player inserts currency into a bill acceptor, establishing the credits the player uses to play the game. For example, if the player inserts a ten-dollar bill, the game will show that the player has \$10 worth of credits. Using a “Shot Cost” button, the player selects a value of between 10¢ and \$2 for each shot. Between each shot, the player can adjust the shot value up or down. The shot value has no bearing on the number of shots needed to capture a dragon. A session of play begins when the player, without any time limit, decides to take the first shot at a dragon.

Game play occurs by the use of a panel on which is located various controls. The player is represented on screen by a turret controlled by a joystick used for aiming and a shot button used for firing. “Shot Power” is a graphic representation of five small vials, each filled with fluid. The

player uses the level of fluid in each vial to determine the power of a shot when shooting in order to maximize the reward for capturing the targeted dragon. The dragons are of different sizes, shapes, and most importantly colors. A key aspect of success in the game is the player's ability to match the color of his or her turret, which rotates through a repeating cycle of colors, to the color of the targeted dragon. The closer the color match at the moment a shot is accurately fired, the fewer shots will be required to capture the dragon and the greater the reward to the player. The amount awarded for capturing each dragon is determined according to a formula that is set in advance, involves no algorithms or random number generators, and is fully disclosed on the Help Screen² available to the player at all times, including prior to depositing any currency into the bill acceptor. Finally, the game also features a "Ticket Button" that the player uses to print a redeemable receipt which the player can exchange for cash.

II. LEGAL STANDARD

"An action for forfeiture of property is a civil action at law." *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011) (quoting *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006)). On an appeal of a magistrate court's judgment:

[T]he appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

S.C. Code Ann. § 18-7-170; *see also* S.C. Code Ann. § 18-7-140 (on appeal from a magistrate court order, the circuit court "shall have the same power over its own determinations, and shall render judgment thereon in the same manner, as the circuit court in actions pending therein, without trial by jury"). "Sections 18-7-140 and 18-7-170 give the Circuit Judge sitting in an

² The Help Screen provides detailed instructions on how to successfully play this game.

appellate capacity the ability to make a determination in the same manner as Circuit Courts in trials without a jury and to reverse a judgment for errors of fact even though the Circuit Judge may not have had the opportunity to observe the demeanor of the witnesses.” *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 234, 312 S.E.2d 20, 21 (Ct. App. 1984); *see Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001) (“Section 18-7-170 provides that on appeal from Magistrate’s Court, the Circuit Court may make its own findings of fact.”).

“Determining the proper interpretation of a statute is a question of law” subject to *de novo* review. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). S.C. Code Ann. § 12-21-2710 is a penal statute and “when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.” *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Moreover “[a]s a general rule, ... forfeitures are not favored in the law or equity.” *Ducworth v. Neely*, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct. App. 1995) (civil forfeiture action in drug related matter).

III. ANALYSIS

The legality of the Dragon’s Ascent machine is governed by S.C. Code Ann. § 12-21-2710, which prohibits:

any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind[.]

As the magistrate court order correctly observed, Dragon’s Ascent obviously is not a machine “for the play of poker, blackjack, keno, lotto, bingo, or craps.” Thus, the critical question is whether it

is a game of chance or skill. *See SLED v. I-Speedmaster S/N 00218*, 397 S.C. 94, 99, 723 S.E.2d 809, 812 (Ct. App. 2011) (holding that skill, as opposed to chance, is what distinguishes a legal activity from illegal “gaming” or “gambling”).

A. The Magistrate Court Correctly Found that Dragon’s Ascent Is a Game of Skill

This Court agrees with, and adopts in full, the magistrate court’s determination that Dragon’s Ascent is a game of skill:

The Court finds that just as with any game of skill, a player may successfully play Dragon’s Ascent using keen hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis. Based on the evidence presented at the hearing, the Court finds that Dragon’s Ascent is a game in which skill predominates over chance.

(Order, at 8.)

SLED devotes a substantial portion of its Respondent’s Brief to its argument that Dragon’s Ascent is not a game of skill. Because SLED did not file a notice of cross-appeal, however, it cannot challenge this finding. An unappealed ruling, “right or wrong, is the law of this case and requires affirmance.” *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

Even if SLED had filed a notice of cross-appeal, it would make no difference because the magistrate court’s finding that Dragon’s Ascent is a game of skill is manifestly correct and is fully supported by the testimony of experts and evidence presented at the post-seizure hearing. This included the testimony of Nick Farley, whom the magistrate court recognized without objection as an expert in the evaluation of video games. Mr. Farley testified, based upon his examination of the

Dragon's Ascent game,³ that as a player can improve upon his or her skills, and achieve better outcomes, by becoming more familiar with the game and the available strategies and features. Mr. Farley's expert opinion is that Dragon's Ascent is a game that is 100 percent skill and thus is certainly a game that is predominantly based in skill.

The magistrate court also heard testimony from the designer of Dragon's Ascent, Brock Smith. Without objection, the magistrate court qualified Mr. Smith as an expert in the design and operation of Dragon's Ascent. Mr. Smith testified that many individuals will study the instruction manual for Dragon's Ascent, practice often, and develop strategies, all of which enables them to consistently succeed in playing this game successfully. Regarding the design of Dragon's Ascent, Mr. Smith testified that he was tasked with developing a game that was "100 percent skill—no chance involved." (Hr'g Tr. 153:6-11.) Mr. Smith, aided by a staff of 20 individuals, spent five years developing Dragon's Ascent. He testified that the game never thwarts a player's efforts to win. It contains no random number generator, algorithm, or other device or coding that might override the player's skill. Finally, he testified that he successfully played Dragon's Ascent for 16 consecutive games just prior to the delivery of the machine to LG's By The Creek. During the hearing he successfully played Dragon's Ascent four consecutive times in the courtroom.

SLED presented testimony from Special Agent Ryan Wood, who played the Dragon's Ascent machine and observed others playing it. Special Agent Wood testified that he did not read any rules or study the Help Screen prior to his initial play session on the game. He testified that he inserted money into the machine, familiarized himself with the buttons on the console, and began playing by shooting at dragons on the screen. Special Agent Wood felt that his results were "totally

³ The machine examined by Mr. Farley was identical to the machine seized from LG's By The Creek.

random” in that it seemed like he obtained different results even when shooting at the same dragons the same number of times. (Hr’g Tr. at 108:19-25.) In light of the testimony of Mr. Farley and Mr. Smith, however, the Court concludes it is far more likely that what Special Agent Wood perceived as different results from multiple shots at the same dragon was, in reality, a result of the differing degree to which his shots matched the color of the target dragon. Maximizing the reward for capturing a dragon by paying close attention to the Shot Power vials and matching the color of the shot fired as closely as possible to the color of the target dragon clearly involves the exercise of skill such as timing, hand/eye coordination, and selectivity. It also accounts for the fact that shots fired at the same dragon will produce more credits or less credits, depending on the shot power and color match.

More broadly, Special Agent Wood’s testimony demonstrates that skill plays the predominant role in the outcome of Dragon’s Ascent even if the player never reads the Help Screen, takes the time to learn the dragons’ patterns, or actively monitors the Shot Power vials. Successful play (*i.e.*, capturing a dragon) inevitably requires hand/eye coordination, aim, timing, manual dexterity, and concentration. Therefore, whether the average player will read the help screen has no bearing on whether Dragon’s Ascent is in fact a game of skill. *See, e.g.*, S.C. Att’y Gen. Op., 2003 WL 21108489, at *2 (S.C.A.G. May 5, 2003) (“Courts considering whether elements of skill are involved in the playing of a particular game have examined factors such as whether the player must demonstrate attributes such as manual dexterity, hand-eye coordination, reflexes, muscular control or the ability to concentrate.”); S.C. Att’y Gen. Op., 2002 WL 31341812, at *2 (S.C.A.G. Aug. 28, 2002) (same); *see also, e.g., Wnek Vending & Amusements Co. v. City of Buffalo*, 434 N.Y.S.2d 608, 612 (N.Y. Sup. Ct. 1980) (video game was one of skill because success “depend[ed] upon eye-hand coordination, reflexes, muscular control and above

all, concentration” as well as “[p]roper timing in aiming and firing”); *Crazie Overstock Promotions, LLC v. State*, 830 S.E.2d 871, 873 (N.C. Ct. App. 2019), *aff’d*, 858 S.E.2d 581 (N.C. 2021) (game that tests player’s hand-eye coordination is a game of skill).⁴

As noted above, the magistrate court’s ruling that Dragon’s Ascent is a game of skill is the law of the case because SLED did not file a notice of cross-appeal. Nevertheless, and for the avoidance of doubt, this Court fully agrees with and therefore affirms the magistrate court’s finding that Dragon’s Ascent is a game of skill.⁵

⁴ The Court does not doubt that Special Agent Wood acted in good faith in seizing the Dragon’s Ascent machine; he simply lacks the training and knowledge to offer persuasive testimony on the issue of its legality. There is no evidence that Special Agent Wood or anyone else on behalf of SLED viewed or analyzed the operating software, the underlying source code, or the internal operations of Dragon’s Ascent. The expert testimony from Mr. Smith, who designed the game, and Mr. Farley, who independently conducted a painstaking examination of the machine, its code, and the manner of its operation, far outweighs Special Agent Woods’s genuine but unfounded view that “this game is pretty simple to me.” (Hr’g Tr. at 121:3-4.) To the contrary, Dragon’s Ascent is in fact a very sophisticated, multi-featured game that rewards players who invest the time and effort needed to develop their skills in playing it.

⁵ As already noted, SLED’s challenges to this finding are not before the Court because SLED did not file a notice of cross-appeal. Nevertheless, the Court notes that SLED’s response brief makes factual statements that are at best unsupported by the record and at worst are contradicted by it. For example, SLED contends that “the functionality of this device preys on the addictive nature of gaming machines” and that certain features of the game are “what keeps players playing.” (Resp. Br. at 19.) However, there is nothing whatsoever in the record regarding whether video games in general have an “addictive nature” or the effect on players of the specific features of Dragon’s Ascent. If SLED had wanted to present testimony regarding the psychology of video games, it could have attempted to find an appropriate expert. Having failed to do so, SLED cannot be allowed to simply invent facts in a “win at any cost regardless of the facts” approach.

Another unsupported factual contention is SLED’s claim that “the device’s algorithm ultimately dictates the outcome of each and every single play on this machine” and that “a player’s knowledge, skill, dexterity, or ability absolutely cannot improve the overall result because this is entirely controlled by the algorithm of the machine.” (Resp. Br. at 16.) SLED does not cite any part of the record to support this totally unfounded statement, and in fact the uncontradicted evidence is that Dragon’s Ascent does not contain any “compensating algorithms” or “random number generators” that might overcome the effect of a player’s skill. (Hr’g Tr. 34:12-19.)

B. The Magistrate Court Erred in Its Interpretation of *Chimento*

Under settled law, the magistrate court’s finding that Dragon’s Ascent is a game of skill established that it is not “gaming” or “gambling” and therefore is not prohibited by S.C. Code Ann. § 12-21-2710. See *Speedmaster*, 397 S.C. at 100, 723 S.E.2d at 812; *Allendale Cnty. Sheriff’s Office v. Two Chess Challenge II*, 361 S.C. 581, 583, 606 S.E.2d 471, 472 (2004). Nevertheless, the magistrate court separately considered whether the Dragon’s Ascent machine was “used for gambling” and adopted a novel “wagering” test to perform this analysis.⁶ (Order at 10.) The magistrate court derived this test from *Chimento*, citing that case for the proposition that “[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game’s outcome.” (Order at 10 (quoting *Chimento*, 401 S.C. at 533, 737 S.E.2d at 838).) After considering the written briefs and the parties’ oral arguments, this Court is persuaded that the magistrate court erroneously interpreted *Chimento* as applying to the issues in this case.

First, the question of a machine’s legality under S.C. Code Ann. § 12-21-2710 was not presented in *Chimento*—indeed, the majority never even cited § 12-21-2710. Rather, the appellants in *Chimento* were convicted of violating S.C. Code Ann. § 16-19-40 by playing “cards” in a “house used as a place of gaming.” In a divided opinion, the Supreme Court reversed the circuit court order setting aside their convictions. Tracing the history of § 16-19-40, the Supreme Court

⁶ The Court notes that although the parties’ briefs discuss whether Dragon’s Ascent has a “free play” feature, the magistrate court did not find the machine to be illegal on this basis. In *dicta*, the magistrate court simply listed “the free play feature” as one of several ways in which the machine seemed to have “characteristics of gambling devices.” (Order, at 12.) In any event, the testimony and evidence clearly demonstrates that what the magistrate court erroneously described as a “free play feature” is nothing of the kind. Rather than a “free play” feature that provides “an entire game free of charge,” Revenue Ruling 16-4, 2016 WL 8794171 (S.C. Dep’t of Rev. May 17, 2016), Dragon’s Ascent has a “free shot” feature that is merely an entertaining way of revealing (not awarding) the credits that the player has already won by previously capturing certain dragons.

concluded that this particular statute applied to the playing of certain specified, enumerated games (such as cards or dice) in certain specified, enumerated locations (such as a kitchen, a barn, or a house used as a place of gaming), regardless of whether they were games of chance or skill. *See id.* at 531, 737 S.E.2d at 836 (“[Section] 16-19-40 criminalizes the playing of certain games and gambling.”).

That *Chimento*’s analysis and holding are limited to § 16-19-40 becomes even clearer upon review of the concurrence written by Chief Justice Toal and the dissent written by Justice Hearn. Chief Justice Toal “agree[d] wholeheartedly” with Justice Hearn’s conclusion that § 16-19-40 is unconstitutionally vague. *Id.* at 536, 737 S.E.2d at 839 (Toal, C.J., concurring); *see id.* at 547-552, 737 S.E.2d at 845-847 (Hearn, J., dissenting). She joined the majority, however, because “we cannot sever the language, ‘a house used as a place of gaming,’ from section 16-19-40 without striking the provision in its entirety,” which she feared would “open the door wide to *all* heretofore illegal gaming practices in this state, including video poker.” *Id.* at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (emphasis in original).

Justice Hearn’s explanation of why Chief Justice Toal’s concern was entirely misplaced is because of the difference between § 16-19-40 and § 12-21-2710:

The prohibition of video poker is found in Section 12–21–2710 of the South Carolina Code (2000). This is a completely separate section (and title) of the code and makes no reference at all to section 16–19–40. In fact, it is entirely independent and separate from the general gambling prohibitions involved here. Striking section 16–19–40 in whole or in part would have no impact on section 12-21–2710.

Id. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting, and concurred in by Justice Kittredge). Notably, the *Chimento* majority opinion did not challenge Justice Hearn on this important explanation.

Second, accepting the magistrate court’s reading of *Chimento* would require this Court to conclude that the Supreme Court overruled decades of precedent without saying it was doing so.

However, numerous decisions demonstrate that when the Supreme Court overrules existing law, it clearly and explicitly states that it is doing so—including in cases involving gambling. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196-97, 525 S.E.2d 872, 883 (2000) (stating, in a case concerning the application of S.C. Code Ann. § 12-21-2710, “We overrule *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), to the extent it permits the destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate’s determination of illegality.”); *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 321, 778 S.E.2d 888, 890 (2015) (“[W]e now overrule our decisions that have implicitly authorized recovery beyond” specific statutes providing for the recovery of gambling losses); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477-78, 527 S.E.2d 763, 765 (2000) (per curiam) (stating that “we overrule our cases which apply the traditional approach” to substantive due process analysis); *Paradis v. Charleston Cnty Sch. Dist.*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021) (“We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state.”).

Third, this Court cannot reconcile the magistrate court’s interpretation of *Chimento* with *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam), decided a mere two years after *Chimento* by the same five justices. In *Awde*, the Court unanimously affirmed a magistrate court’s “finding that two ‘Chess Challenge II’ devices before it were legal games of skill.” *Id.* The parties’ briefs raised arguments concerning, *inter alia*, the “used for gambling” prong of § 12-21-2710. If the Supreme Court had intended *Chimento* to apply when determining the legality of a machine under § 12-21-2710, it surely would not have issued an affirmance in *Awde*. The fact that the Court affirmed—in an unpublished, per curiam opinion—strongly demonstrates that the “wagering” test used in *Chimento* does not apply

to the analysis of whether a game is legal under § 12-21-2710 but, in fact, is limited solely to § 16-19-40.

In addition to the Supreme Court’s post-*Chimento* ruling in *Awde*, all of the following have applied the dominant factor test in the years after the *Chimento* decision: the Attorney General;⁷ the Administrative Law Court;⁸ the Circuit Court;⁹ and the Court of Appeals.¹⁰ Moreover, no court or other authority has ever cited *Chimento* for the proposition that any video game involving consideration and a potential prize is illegal regardless of whether the outcome is determined by chance or the player’s skill. Rather, South Carolina courts at every level have only cited *Chimento* for the entirely unrelated subject of standards for constitutional challenges to statutory provisions.¹¹ Notably, one of these cases involved the legality of a video game machine under § 12-21-2710. *See Smith v. SLED*, 2013 WL 8477943 (S.C. Ct. Com. Pl., Anderson County, Nov.

⁷ *See Op. S.C. Atty Gen.*, 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that “South Carolina gambling laws” prohibit “games of chance”).

⁸ *See SCDOR v. Chestnut*, 2021 WL 4822858, at *6 (Oct. 8, 2021) (stating that “games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710”).

⁹ *See Smith v. SLED*, 2013 WL 8477943, at *2 (S.C. Ct. Common Pl., Anderson County, Nov. 6, 2013) (“[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]”).

¹⁰ *See SCDOR v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) (“[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12–21–2710[.]”).

¹¹ **Supreme Court:** *S.C. Hum. Affairs Comm’n v. Zeyi Chen*, 430 S.C. 509, 531, 846 S.E.2d 861, 872 (2020) (vagueness); *State v. Legg*, 416 S.C. 9, 14 n.4, 785 S.E.2d 369, 371 n.4 (2016) (facial challenge); *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506–07, 757 S.E.2d 388, 392–93 (2014) (facial challenge). **Court of Appeals:** *Rutter v. City of Columbia Design/Dev. Rev. Comm’n*, 2021 WL 2701549, at *3 (S.C. Ct. App. June 30, 2021) (vagueness). **Circuit Courts:** *Retail Servs. & Sys., Inc. v. S.C. Dep’t of Rev.*, 2014 WL 12692755, at *2 (S.C. Com. Pl., Aiken County, May 29, 2014) (as-applied challenge); *Smith v. SLED*, 2013 WL 8477943, at *11 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) (citing vagueness). **Administrative Law Courts:** *Hyndman v. Charleston County Assessor*, 2013 WL 1786476, at *3 (S.C. Admin. Law Ct. Apr. 18, 2013) (as-applied challenge).

6, 2013). The circuit court decided the question under the dominant factor test rather than under *Chimento*'s "wagering test," even though its order contains a discussion of *Chimento* in the context of a constitutional challenge based on vagueness. *See id.* at *2-3.

Fourth and finally, the Court cannot ignore that the magistrate court's view of *Chimento*, if widely adopted would turn participating in ordinary skill-based games into an illegal activity if a participant merely pays an entry fee and may receive a prize for successful play. The magistrate court's novel "wagering" test utterly disregards the decades-old accepted legality of "paying to play" a predominantly skill game, whether by depositing currency into a video game machine like Dragon's Ascent or by paying an entry fee to participate in a local golf tournament. The affected participants would also include not just amateurs participating in local events but also pro athletes who come to South Carolina to participate in nationally known events like the Heritage Classic golf tournament, the Charleston Open women's tennis tournament, and the Darlington 500 NASCAR race. The effect would extend even to state-sponsored events like the Governor's Cup Billfishing Series. The potentially far-reaching consequences of reading *Chimento* as establishing a "wagering" test which applies across the board to all games of skill is a strong basis to question the wisdom of accepting the magistrate court's order *in toto*, especially in light of the other factors discussed above, all of which indicate that the magistrate court read into *Chimento* a holding that simply is not there.

For these reasons, this Court affirms the magistrate court's decision finding that Dragon's Ascent is a game predominantly based on skill and reverses the magistrate court's decision to the extent it holds that Dragon's Ascent, despite being a game of skill, nevertheless violates S.C. Code Ann. § 12-21-2710 under a novel "wagering" test derived from the Supreme Court's decision in *Chimento*.

IV. CONCLUSION

For the reasons set forth herein, the order of the magistrate court is affirmed in part and reversed in part.

IT IS SO ORDERED.

Hon. Bentley Price, S.C. Circuit Court Judge

Charleston, S. C.

December _____, 2022.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2022-CP-08-02026

1 Dragon’s Ascent Video Gaming Machine;)
SC Games of Skill, LLC,)
)
Appellants,)
)
v.)
)
South Carolina Law Enforcement Division)
(SLED),)
)
Respondent.)

ORDER

This matter came before me on December 12, 2022, for hearing on the appeal of a decision issued by the Honorable Rad S. Deaton, Chief Magistrate in Berkeley County. The Appellants were represented on the appeal by Attorneys William W. Wilkins, Peter M. McCoy, Jr., and Christopher J. Murphy. SLED was represented by its General Counsel Adam L. Whitsett.

After considering the trial court record and the arguments set forth by the respective parties, I hereby UPHOLD and AFFIRM Chief Magistrate Deaton’s decision and find that the Dragon’s Ascent device at issue in this action violates S.C. Code Ann. § 12-21-2710.

STANDARD OF REVIEW

“Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all of the parties and for errors of law or fact.” S.C. Code § 18-7-170. “At a post-seizure hearing, the burden is on the owner of the *res* [the seized device] to show why the seized property should not be forfeited and destroyed.” Union County Sheriff’s Office v. Henderson, 395 S.C. 516, 719 S.E.2d 665, 666 (2011).

ANALYSIS

I find and conclude that Chief Magistrate Deaton correctly applied South Carolina law in finding that the device at issue is an illegal gambling device that violates S.C. Code Ann. § 12-21-2710. The South Carolina Supreme Court has long acknowledged that it “consistently has deferred to the Legislature’s determination of which gaming devices must be sacrificed for the public welfare. Furthermore, forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable.” Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 303-4, 534 S.E.2d 270, 272 (2000) *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005).

S.C. Code Ann. § 12-21-2710 is the South Carolina Legislature’s determination of the types of machines and devices that are illegal to possess or operate in South Carolina. This law states:

SECTION 12-21-2710. Types of machines and devices prohibited by law; penalties.

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or **any machine or device licensed pursuant to Section 12-21-2720 and used for gambling** or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance....(emphasis added).

In interpreting this statute, as with all statutes, the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). And, the true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). In Westside Quik Shop v. Stewart, the South Carolina Supreme Court acknowledged the “true aim and intent” of § 12-21-2710 indicating:

[f]inally in an extra session called by the Governor in June 1999 S.C. Act No. 125 providing for a November referendum to be held statewide to decide the fate of video gaming. Voters would be asked whether cash payouts for video gaming machines should continue to be allowed after June 30, 2000. If voters answered “no,” Part 1 of the Act would become effective July 1, 2000. **This part of the Act repeals § 16-19-60, which allows nonmachine cash payouts, and amends S.C. Code Ann. § 12-21-2710 (2000) to remove the exception for video gaming machines, thereby rendering the possession of these machines illegal...** Further, under S.C. Code Ann. § 12-21-2712 (2000), these machines are then subject to forfeiture and destruction by the State... Before the referendum was held, an action was brought challenging its constitutionality. After taking the case in our original jurisdiction in October 1999, this Court struck down the referendum, but severed it from the remaining parts of the Act. Specifically, we found Part I, which bans the possession or operation of these machines, to be a free standing legislative enactment and therefore valid. Joytime Distrib. and Amusement Co. v. State, 338 S.C. 364, 528 S.E.2d 647 (1999). **Accordingly, on July 1, [2000] under § 12-21-2710 and -2712, these machines will become contraband subject to forfeiture and destruction regardless of their use or operability.**

341 S.C. 297, 301-2, 534 S.E.2d 270, 272 (2000). (emphasis added). The Supreme Court has also indicated that

The plain language of the statute makes clear the legislature’s intent to outlaw mere possession of such machines. The statute makes it unlawful “for any person to keep on his premises *or* operate” certain gambling machines. S.C.Code Ann. § 12-21-2710 (Supp.1998) (emphasis added); *see also* State v. Appley, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a machine is a violation in itself, separate from the crime of operation). **The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.**

338 S.C. at 187-89, 525 S.E.2d at 878-79 (2000) (emphasis added).

In addition, the introductory language of 1999 S.C. Act 125 provides clear and unequivocal proof of the intent of the South Carolina Legislature when passing this law. 1999 S.C. Act 125 was

AN ACT TO AMEND SECTIONS 12-21-2710, AS AMENDED, 12-21-2712, 12-21-2720, AS AMENDED, AND 12-21-2726, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO COIN-OPERATED MACHINES OR DEVICES, SO AS TO EXTEND THE PROHIBITION ON SLOT MACHINES AND OTHER MACHINES OR DEVICES PERTAINING TO GAMES OF CHANCE TO VIDEO GAMES WITH A FREE PLAY FEATURE OR ANY OTHER COIN-OPERATED MACHINE OR DEVICE USED FOR GAMBLING, TO EXTEND THE SEIZURE AND DESTRUCTION PROVISIONS APPLICABLE TO GAMES OF CHANCE TO THESE EXPANDED PROHIBITIONS,...

AND TO REPEAL SECTIONS 12-21-2703, 16-19-60, AND ARTICLE 20, CHAPTER 21 OF TITLE 12 RELATING RESPECTIVELY TO THE RETAIL LICENSE REQUIREMENT FOR A LOCATION WITH VIDEO GAMES WITH A FREE PLAY FEATURE, THE EXEMPTION OF VIDEO GAMES WITH A FREE PLAY FEATURE FROM THE GAMBLING OFFENSES, AND THE VIDEO GAMES MACHINES ACT, ALL OF THE ABOVE ENACTED FOR THE PURPOSE OF PROHIBITING CASH PAYOUTS FOR CREDITS EARNED ON VIDEO GAME MACHINES ON AND AFTER JULY 1, 2000;....(emphasis added).

Further, “PART I” of this bill is specifically entitled “Prohibition on Payouts”. 1999 S.C. Act 125.

Accordingly, there is and can be no doubt whatsoever that the South Carolina Legislature amended § 12-21-2710 in 1999 specifically to prohibit cash payouts on gaming machines like the machine at issue in this action. In interpreting § 12-21-2710, “we must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,’ for ‘[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.’” Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018). Moreover, “[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

The undisputed evidence in this case established that there were cash payouts available for the play of this device. Cash prizes were never disputed by the Appellants. Regardless, SLED Special Agent Ryan Wood testified specifically that he “put money in” this Dragon’s Ascent machine, that he “wagered different amounts” during his play, that “the more you wagered the more you stood to win if you were successful destroying that particular dragon”, and that he “sometimes walked away with more money”. (Tr. p. 94). Further, the stated “Goal” of the entire game is to, “Shoot dragons to win credits! Credits are redeemable for cash.” (Help Screen).

The evidence in this matter also indicated a player could win more than \$1,700 for the play of this machine. Special Agent Wood testified that the amount of the “Rainbow Dragon” during his first undercover operation at LG’s By the Creek was “\$614.” (Tr. p. 96). During his second undercover operation at this location, Wood acknowledged that the “Rainbow Dragon” was worth in the “\$700 range”. (Tr. p. 110). During his final undercover operation, Wood recalled that the amount available to win for the “Rainbow Dragon” was “\$1,555.41”. (Tr. p. 115). In court, the value of the “Rainbow Dragon” was “1,783”. (Tr. p. 52). As such, the undisputed evidence in this case proved that there were cash payouts, up to \$1,783, available for the play of this device.

This unchallenged evidence conclusively proves that this device was “used for gambling” in direct contravention of the plain language and clear intent of § 12-21-2710. The Appellants’ interpretation of § 12-21-2710, which allows for cash payouts for the play of this device must be rejected because 1999 S.C. Act 125 was enacted specifically “for the purpose of prohibiting cash payouts for credits earned on video game machines on and after July 1, 2000.” 1999 S.C. Act 125 *see also* Lancaster Cnty. Bar Ass’n v. S.C. Comm’n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (courts “will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”).

Further, the Appellants' characterization of the Judge Deaton's application of the Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012) decision to the facts of this case is simply inaccurate. The Appellants' incorrectly assert that Judge Deaton erred by creating a new test for analyzing the legality of gaming machines in South Carolina. He did not. Rather, Judge Deaton correctly applied the South Carolina Supreme Court's precedent regarding the interpretation of the "statutory" definition of gambling in a prior "skill versus chance" argument in a case involving similar gambling conduct. In Chimento, the Supreme Court was asked to determine whether poker was a legal "game of skill" or illegal gambling in South Carolina. *Id.* In analyzing this issue, the Supreme Court articulated that "skill versus chance" is not the only relevant inquiry in the context of whether specific "skillful" conduct is prohibited gambling.

Rather, the Supreme Court indicated that the "statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance." *Id.* at 837. The Court went further to specifically acknowledge that, "[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game's outcome." *Id.* at 838. Accordingly, in interpreting the statutory word "gambling" that exists in § 12-21-2710, Judge Deaton correctly applied the Supreme Court's precedent by answering the same question with the same answer. This was not error. Notably, in the Speedmaster case relied upon by the Appellants, the South Carolina Court of Appeals acknowledged the existence of the Town of Mount Pleasant v. Chimento case and the possibility that the Supreme Court may clarify South Carolina law on "games of skill". See S.C. L. Enf't Div. v. 1-Speedmaster S/N 00218, 397 S.C. 94, 98, *fn 1*, 723 S.E.2d 809, 811 (Ct. App. 2011) ("We are aware of a case currently under consideration by the South Carolina Supreme Court, *Town of Mt. Pleasant v. Chimento* (heard October 19, 2010), which may address this issue.").

As surmised by the Court of Appeals, the South Carolina Supreme Court did in fact clarify the law in South Carolina regarding the determination as to whether a “game of skill” is still illegal gambling in South Carolina. In the context of whether “skillful” conduct is gambling, the Supreme Court held that courts must evaluate “whether there is money or something of value wagered on the game’s outcome.” Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830, 838 (2012). To that end, the evidence clearly established that players could wager on this device. The evidence established that players could select the amount of money to play on each individual shot and that the amount of money the player stands to win directly correlates to the amount wagered – *i.e.*, the more you pay to play, the more you stand to win. (Tr. p. 125). In fact, the evidence established that this device has a “Raise your cost” button, which directly facilitates wagering on the device. (Tr. pp. 92-3). At trial, Special Agent Wood testified specifically that he wagered and gambled on this device. He testified that he “cycled through the raise your shot cost button”, which allowed the player to select his wager between \$.10, .20, .50, 1.00, or 2.00 per shot. (Tr. p. 92). He acknowledged that “it was obvious that was some type of wager button.” *Id.* He testified that he wagered “ten cent first. Then I took the joystick -- moved the joystick around. I noticed the gun moved around with the joystick. I then moved the joystick, hit the shoot button. I shot it. A projectile came out of the gun. I struck a dragon on the screen and nothing happened except for that ten cents was deducted from my total value of \$20. So at that point I was down to \$19.90.” (Tr. p. 93). S/A Wood further testified that “the more you wagered the more you stood to win if you were successful destroying that particular dragon.” (Tr. p. 94). Specifically, Wood noted “I noticed that if I was wagering ten cent and selected the small pink dragons going across the screen and was successful destroying it then I would get 60 cents. If I moved my bet to 20 cents I would -- for that same dragon I would get a \$1.20.” (Tr. p. 94).

The existence of the player's ability to wager on the outcome of this device is also what separates the analysis of the illegality of this gaming machine from the various other forms of conduct argued by the Appellants at the hearing. The Appellants argue that finding this machine to be illegal gambling would also render professional golf tournaments, NASCAR races, and country club memberships illegal in South Carolina. This is simply not the case. Initially, in South Carolina, a "court should... examine the complainant's conduct before analyzing other hypothetical applications of the law." Martin v. Lloyd, No. 2:06-CV-400-DCN, 2011 WL 1261543, at *4 (D.S.C. Mar. 31, 2011), aff'd, 700 F.3d 132 (4th Cir. 2012). Further, "the court should address the games possessed by plaintiffs, not hypothetical games such as Monopoly, solitaire, or cards." Martin v. Lloyd, 2:06-CV-400-DCN, 2011 WL 1261543, *4 n.3 (D.S.C. Mar. 31, 2011). As such, the only relevant question in this case is the legality of the Dragon's Ascent gaming machine on which players stand a chance to win cash prizes that was seized and brought before the Court in accordance with South Carolina law. *See* S.C. Code Ann. § 12-21-2712. The legality of other conduct is simply not relevant to this determination.

Furthermore, any argument that the payment of a country club membership or an entry fee for a professional sports competition constitutes a wager is simply without merit. Payment of an entry fee to participate in a professional sports competition stands in stark contrast to a player inserting money into a gaming machine on which a player can use the "Raise Your Shot" button to select between \$.10, .20, .50, 1.00, or 2.00 per shot per play and have that selection directly correlate to the amount the player can win in cash prizes. In addition, the conduct articulated by the Appellants does not involve a machine or any device and therefore would not even fall under the purview of § 12-21-2710 in any event. Accordingly, the Appellants arguments in this regard are simply without merit and must be rejected.

Moreover, the fact that § 12-21-2710 separately prohibits “any machine or device licensed pursuant to Section 12-21-2720 and used for gambling” and any “device pertaining to games of chance of whatever name or kind...” is irrefutable. This inclusion of separate provisions outlawing devices “used for gambling” and devices “pertaining to games of chance” is also unequivocal proof that the South Carolina Legislature intends to prohibit this separate conduct. Otherwise, these provisions would be redundant and superfluous. *See Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018). (“we must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,’ for ‘[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.’”). As far back as 1929, the South Carolina Supreme Court acknowledged that a “machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition.” *Harvie v. Heise*, 150 S.C. 277, 148 S.E. 66, 68 (1929) *quoting* 27 C. J. 989. Moreover, the inclusion of a specific prohibition for any machine or device used for gambling is conclusive proof of the legislative intent to ban payouts on devices in South Carolina. *See* 1999 S.C. Act 125.

The Appellants would have this Court construe § 12-21-2710 to allow all individuals to receive cash payouts so long as a game’s designer or an expert witness was capable of “winning” some nominal amount on the device every time. This interpretation essentially nullifies the word gambling in § 12-21-2710, or, at the very least, renders it superfluous in contravention of established South Carolina law. This Court cannot agree with Appellants’ interpretation because the clear intent of the South Carolina Legislature with the passage of 1999 S.C. Act 125 was to prohibit “cash payouts for credits earned on video game machines on and after July 1, 2000.” 1999 S.C. Act 125.

In addition, South Carolina law prohibits the “mere possession” of machines on which individuals can gamble and receive cash payouts – like this Dragon’s Ascent machine. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 188-9, 525 S.E.2d 872, 879 (2000).

The South Carolina Supreme Court has long held that

an allegedly illegal video gaming machine is deemed an unlawful gambling device at the moment of seizure, *i.e.*, the machine is contraband *per se* because it is illegal to possess and not susceptible of ownership. Moreover, this conclusion is appropriate in light of South Carolina’s long-established statutory prohibitions on the ownership or use of specified gambling devices, including video gambling devices developed in recent years. *See Johnson [v. Collins Entertainment Co.]*, 88 F.Supp.2d [499]...502 n. 1 [D.S.C. 1999] (“[l]egislation designed to control ‘the mischiefs of gambling’ was enacted by the South Carolina colonial legislature in 1712”).

Mims Amusement Co. v. S. Carolina Law Enforcement Div., 366 S.C. 141, 154, 621 S.E.2d 344 (2005). As such, because the device offers illegal cash payouts, the device is contraband *per se* and is illegal to possess regardless of other intended, capable, or other possible uses.

Chief Magistrate Deaton also correctly noted that “while Dragon’s Ascent is a game that requires a high degree of skill to master its complexities, the Court believes it is a game designed to make money for the “house,” not the payer, in the context of regular game play, and brings with it the dire concerns referenced by Chief Justice Toal in her concurring opinion in *Chimento, infra*.” (Order p. 8 fn. 3). Judge Deaton also noted that “it is not probable that most Dragon’s Ascent players will exercise the dedication, patience, and deductive analysis in order to play the game successfully.” *Id.* Rather, as articulated by SLED Special Agent Wood, players put money in this machine; wager different amounts as “the more you wagered the more you stood to win”; and players can undeniably win cash payouts whether in the amount of “\$614”, “\$1,555.41”, or “1,783”. (Tr. pp. 52, 94, 96, 115). Putting money into a gaming machine with the ability to win money is illegal gambling in South Carolina.

In Chimento, former Chief Justice Toal articulated the devastating impact that removing the gambling prohibitions would have in South Carolina. She noted that this

would also open the door wide to *all* heretofore illegal gaming practices in this state, including video poker. *See* S.C.Code Ann. § 16–19–40(g) (proscribing the playing of “any machine or device ... used for gambling purposes”). Because of this very real consequence, I am concerned that striking this critical language from the statute would beget, as elucidated by the General Assembly in 1816 when amending section 16–191–40, the “impoverishment of many people, corruption of the morals and manners of youth, ... the tendency which is vice, misery and crime, as examples in this state have abundantly proven.” These dire concerns resonate as much today as they did nearly 200 years ago. I do not need to remind any person of the havoc wreaked upon this State as a result of the “pernicious” practice of video poker. Although there are other sound provisions outlawing video poker, *see* S.C.Code Ann. §§ 1221–2710, 2712 (2000), I am loathe to strike the critical language from the general ban on gaming in the event that it guts these provisions, and consequently, South Carolina’s longstanding prohibition against gambling.

Town of Mount Pleasant v. Chimento, 401 S.C. 522, 537–38, 737 S.E.2d 830, 840 (2012). This same concern exists in this present action should § 12-21-2710 be interpreted to allow individuals to receive cash payouts for the play of this device.

The express purpose of § 12-21-2710 is clear - to prohibit cash payouts for credits earned on gaming machines. *See* 1999 S.C. Act 125. In South Carolina,

[i]f a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation. *Id.* Moreover, “it is beyond this Court’s power to effect a change in the statutes enacted by the Legislature.” State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); *see also* Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does “not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly”).

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007). This Court will not second guess the wisdom or folly of the policy decision of the South Carolina Legislature regarding the illegality of cash payouts on gaming machines.

CONCLUSION

In South Carolina, “[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). The South Carolina Legislature’s express purpose in amending § 12-21-2710 in 1999 was “FOR THE PURPOSE OF PROHIBITING CASH PAYOUTS FOR CREDITS EARNED ON VIDEO GAME MACHINES ON AND AFTER JULY 1, 2000....” 1999 S.C. Act 125. This Legislative policy decision has not materially changed since 2000. Notably, the South Carolina Legislature did in fact amend § 12-21-2710 in May of 2022; however, this amendment did not change the prohibition on machines or devices used for gambling nor did it authorize cash payouts on machines in South Carolina. *See* 2022 Act No. 190 (allowing federally licensed South Carolina gaming device manufacturers to produce and sell items to out-of-state jurisdictions). As such, South Carolina’s longstanding prohibition on cash payouts and on machine or devices used for gambling set forth in § 12-21-2710 remains the law applicable to this case. To that end, the record unequivocally demonstrates that there were cash payouts – up to \$1,783 – for credits earned on the Dragon’s Ascent device in question. Accordingly, the trial court correctly held this Dragon’s Ascent device violates S.C. Code Ann. § 12-21-2710. Therefore, the trial court’s decision is hereby affirmed.

IT IS SO ORDERED!

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2022-CP-08-02026

1 Dragon’s Ascent Video Gaming Machine;)
SC Games of Skill, LLC,)
)
Appellants,)
)
v.)
)
South Carolina Law Enforcement Division)
(SLED),)
)
Respondent.)

NOTICE OF MOTION AND
MOTION TO ALTER, AMEND, AND
RECONSIDER

PLEASE TAKE NOTICE THAT, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Respondent SLED hereby respectfully moves this Honorable Court to reconsider, alter, and amend its Order issued February 27, 2023 and respectfully requests a hearing on this matter. The grounds for this motion are as follows:

1. The order does *not* accomplish the clear intent of the South Carolina Legislature, nor does it adhere to South Carolina’s longstanding prohibition on cash payouts on gaming machines that is set forth in S.C. Code Ann. § 12-21-2710 (§ 12-21-2710).

The cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). This Court’s order does not construe § 12-21-2710 in light of its clear intended purpose nor does it accomplish the intent of this statute.

In Westside Quik Shop v. Stewart, the South Carolina Supreme Court acknowledged the purpose of the Legislature's amendments to § 12-21-2710 from the year 1999 indicating:

[f]inally in an extra session called by the Governor in June 1999 S.C. Act No. 125 providing for a November referendum to be held statewide to decide the fate of video gaming. Voters would be asked whether cash payouts for video gaming machines should continue to be allowed after June 30, 2000. If voters answered "no," Part 1 of the Act would become effective July 1, 2000. **This part of the Act repeals § 16-19-60, which allows nonmachine cash payouts, and amends S.C. Code Ann. § 12-21-2710 (2000) to remove the exception for video gaming machines, thereby rendering the possession of these machines illegal...** Further, under S.C. Code Ann. § 12-21-2712 (2000), these machines are then subject to forfeiture and destruction by the State... Before the referendum was held, an action was brought challenging its constitutionality. After taking the case in our original jurisdiction in October 1999, this Court struck down the referendum, but severed it from the remaining parts of the Act. Specifically, we found Part I, which bans the possession or operation of these machines, to be a free standing legislative enactment and therefore valid. Joytime Distrib. and Amusement Co. v. State, 338 S.C. 364, 528 S.E.2d 647 (1999). **Accordingly, on July 1, [2000] under § 12-21-2710 and -2712, these machines will become contraband subject to forfeiture and destruction regardless of their use or operability.**

341 S.C. 297, 301-2, 534 S.E.2d 270, 272 (2000). (emphasis added). The Supreme Court has also specified that

The plain language of the statute makes clear the legislature's intent to outlaw mere possession of such machines. The statute makes it unlawful "for any person to keep on his premises *or* operate" certain gambling machines. S.C.Code Ann. § 12-21-2710 (Supp.1998) (emphasis added); *see also State v. Appley*, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a machine is a violation in itself, separate from the crime of operation). **The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.**

338 S.C. at 187-89, 525 S.E.2d at 878-79 (2000) (emphasis added). It is clear that § 12-21-2710 was amended in 1999 specifically to end the havoc wreaked on South Carolina by cash payouts on gaming machines. The introductory language of 1999 S.C. Act 125 provides even a clearer recitation of the intent of the South Carolina Legislature. This bill, 1999 S.C. Act 125, was

AN ACT TO AMEND SECTIONS 12-21-2710, AS AMENDED, 12-21-2712, 12-21-2720, AS AMENDED, AND 12-21-2726, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO COIN-OPERATED

MACHINES OR DEVICES, SO AS TO EXTEND THE PROHIBITION ON SLOT MACHINES AND OTHER MACHINES OR DEVICES PERTAINING TO GAMES OF CHANCE TO VIDEO GAMES WITH A FREE PLAY FEATURE OR ANY OTHER COIN-OPERATED MACHINE OR DEVICE USED FOR GAMBLING, TO EXTEND THE SEIZURE AND DESTRUCTION PROVISIONS APPLICABLE TO GAMES OF CHANCE TO THESE EXPANDED PROHIBITIONS,...

AND TO REPEAL SECTIONS 12-21-2703, 16-19-60, AND ARTICLE 20, CHAPTER 21 OF TITLE 12 RELATING RESPECTIVELY TO THE RETAIL LICENSE REQUIREMENT FOR A LOCATION WITH VIDEO GAMES WITH A FREE PLAY FEATURE, THE EXEMPTION OF VIDEO GAMES WITH A FREE PLAY FEATURE FROM THE GAMBLING OFFENSES, AND THE VIDEO GAMES MACHINES ACT, ALL OF THE ABOVE ENACTED FOR THE PURPOSE OF PROHIBITING CASH PAYOUTS FOR CREDITS EARNED ON VIDEO GAME MACHINES ON AND AFTER JULY 1, 2000;....(emphasis added).

Further, “PART I” of this bill is specifically entitled “Prohibition on Payouts”. 1999 S.C. Act 125.

Accordingly, there is no doubt that the South Carolina Legislature amended § 12-21-2710 in 1999 to specifically prohibit cash payouts on gaming machines like this machine. However, despite this clear and specific Legislative intent, this Court’s order allows for cash payouts for the play of this machine. This Court’s order acknowledges that “the game also features a “Ticket Button” that the player uses to print a redeemable receipt which the player can exchange for cash.” (Order p. 4). The evidence in this matter indicated a player could win more than \$1,700 for the play of this machine. (Tr. p. 52). Put simply, this Court’s interpretation of the statute enacted “for the purpose of prohibiting cash payouts for credits earned on video game machines...” to allow cash payouts for credits earned on a video game machine is clear error and this decision should be reconsidered. *See* 1999 S.C. Act 125 *see also* Lancaster Cnty. Bar Ass’n v. S.C. Comm’n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (courts “will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”).

2. The order misapplies and mischaracterizes the existing precedent set forth by the South Carolina Supreme Court in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012).

Further, this Court erred in its analysis of the Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012) decision. Specifically, this Court incorrectly asserts that the trial court used Chimento to create a new “wagering” test in South Carolina. The trial court did not create a new test. Rather, the trial court correctly applied the South Carolina Supreme Court’s precedent regarding the interpretation of the “statutory” definition of gambling *in South Carolina* set forth in a prior “skill versus chance” argument that had been made in a poker case. In Chimento, the Supreme Court was asked to determine whether poker was a legal in South Carolina as a “game of skill” or whether it was illegal gambling in South Carolina. *Id.* In analyzing this issue, the Supreme Court articulated that “skill versus chance” is not the only relevant inquiry in the context of whether specific “skillful” conduct can still be gambling in South Carolina. Rather, the Supreme Court indicated that the “statutory meaning of the word ‘gambling’ *in South Carolina* includes games in which skill outweighs chance.” *Id.* at 837 (emphasis added). Notably, the Court did *not* limit this decision to the statutory meaning of the word “gambling” to Chapter 19 of Title 16 or to S.C. Code Ann. § 16-19-40 as found by this Court. Rather, the Supreme Court was clear and unequivocal in its use of the phrase “the statutory meaning of the word gambling *in South Carolina*”. *Id.* (emphasis added). Accordingly, contrary to this Court’s finding, the South Carolina Supreme Court’s interpretation of the word “gambling in South Carolina” is not limited to Chapter 19 of Title 16 or to S.C. Code Ann. § 16-19-40. Rather, this precedential opinion must also be read to apply to the word “gambling” that exists in all South Carolina statutes, including as used in the phrase “device licensed pursuant to Section 12-21-2720 and used for gambling” found in § 12-21-2710.

Moreover, Chimento was a clarification of gambling law in South Carolina meant specifically to adhere with the Legislature’s clear intent and stated gambling prohibitions in South Carolina. *See* 1999 Act 125. To that end, in Chimento, former Chief Justice Toal articulated the devastating impact that removing the gambling machine prohibitions would have in South Carolina. She noted that it

would also open the door wide to *all* heretofore illegal gaming practices in this state, including video poker. *See* S.C.Code Ann. § 16–19–40(g) (proscribing the playing of “any machine or device ... used for gambling purposes”). Because of this very real consequence, I am concerned that striking this critical language from the statute would beget, as elucidated by the General Assembly in 1816 when amending section 16–191–40, the “impoverishment of many people, corruption of the morals and manners of youth, ... the tendency which is vice, misery and crime, as examples in this state have abundantly proven.” These dire concerns resonate as much today as they did nearly 200 years ago. I do not need to remind any person of the havoc wreaked upon this State as a result of the “pernicious” practice of video poker. Although there are other sound provisions outlawing video poker, *see* S.C.Code Ann. §§ 1221–2710, 2712 (2000), I am loathe to strike the critical language from the general ban on gaming in the event that it guts these provisions, and consequently, South Carolina’s longstanding prohibition against gambling.

Town of Mount Pleasant v. Chimento, 401 S.C. 522, 537–38, 737 S.E.2d 830, 840 (2012). The South Carolina Supreme Court has long acknowledged that,

[i]n no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions.

Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 69 (1929). This Court’s ruling interpreting § 12-21-2710 to allow cash payouts on this Dragon’s Ascent machine is contrary to the specific intent of the South Carolina Legislature and, without reconsideration, opens the door to the dire concerns of the havoc wreaked upon this State as a result of the “pernicious” practice of video poker.

When analyzing the statutory meaning of the word gambling in South Carolina in accordance with this specific intent of the Legislature, the South Carolina Supreme Court specifically acknowledged that, “[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game’s outcome.” *Id.* at 838. Notably, this was the same argument presented in this case as Respondent has consistently argued that regardless of whether chance or skill predominated the play on a machine, it could still be illegal gambling in South Carolina. This accords with the proper interpretation of the statutory word “gambling” that exists in § 12-21-2710’s prohibition of all “device[s] licensed pursuant to Section 12-21-2720 and used for gambling” as clarified by the Supreme Court in Chimento. To put it simply, the trial court did not err by answering the same question that was posed to the South Carolina Supreme Court with the same answer.

Notably, in the Speedmaster case relied upon by this Court, the South Carolina Court of Appeals acknowledged the existence of the Chimento case and the possibility that the Supreme Court may clarify South Carolina law on “games of skill”. *See S.C. L. Enf’t Div. v. 1-Speedmaster S/N 00218*, 397 S.C. 94, 98, *fn 1*, 723 S.E.2d 809, 811 (Ct. App. 2011) (“We are aware of a case currently under consideration by the South Carolina Supreme Court, *Town of Mt. Pleasant v. Chimento* (heard October 19, 2010), which may address this issue.”). As surmised by the Court of Appeals, the South Carolina Supreme Court did in fact clarify the law in South Carolina regarding the determination as to whether a “game of skill” is still illegal gambling in South Carolina. In the context of whether “skillful” conduct can still be gambling, the Supreme Court held that courts must evaluate “whether there is money or something of value wagered on the game’s outcome.” Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830, 838 (2012). This was not a departure from a “multiple-decades-old definition” of gambling as articulated by this Court.

Accordingly, this Court should alter or amend its findings to apply the Supreme Court's decision in Chimento to the statutory meaning of the word gambling in South Carolina. To that end, this Court should acknowledge that the Magistrate did not err in following the precedent set forth in Chimento and finding that the determination as to whether this machine is an illegal gambling device does not turn on the relative ration of skill versus chance, rather it turns on existence of a wager. To that end, this device has a "Raise your cost" button that directly facilitates the player's ability to wager on the device. (Tr. pp. 92-3). SLED Special Agent Wood specifically testified that he "cycled through the raise your shot cost button", which allowed the player to select his wager between \$.10, .20, .50, 1.00, or 2.00 per shot. (Tr. p. 92). Wood acknowledged specifically that "it was obvious that was some type of wager button." *Id.* Wood further testified that he was able to continuously wager on the Dragon's Ascent device and that "the more you wagered the more you stood to win if you were successful destroying that particular dragon." (Tr. p. 94). Specifically, Wood noted "I noticed that if I was wagering ten cent and selected the small pink dragons going across the screen and was successful destroying it then I would get 60 cents. If I moved my bet to 20 cents I would -- for that same dragon I would get a \$1.20." (Tr. p. 94).

Ultimately, Special Agent Wood confirmed unequivocally that he "put money in" this Dragon's Ascent machine, that he "wagered different amounts", that "the more you wagered the more you stood to win if you were successful destroying that particular dragon", and that he "sometimes walked away with more money". (Tr. p. 94). Moreover, Wood testified that he also witnessed other players winning money on the play of this device. (Tr. p. 120). As such, Special Agent Wood's testimony established that an individual can wager and, thus, gamble on this device rendering it an illegal gambling device prohibited by § 12-21-2710. *See Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), *reh'g denied* (Jan. 10, 2013).

3. The order does not properly apply the gambling capability analysis required by South Carolina law.

The South Carolina Supreme Court has acknowledged that the South Carolina Legislature intended to prohibit the mere possession of machines on which individuals can gamble. Specifically, the Supreme Court has noted that

The plain language of the statute [S.C. Code Ann. § 12-21-2710] makes clear the legislature’s intent to outlaw mere possession of such machines. The statute makes it unlawful “for any person to keep on his premises *or* operate” certain gambling machines. S.C. Code Ann. § 12–21–2710 (Supp.1998) (emphasis added); *see also State v. Appley*, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a machine is a violation in itself, separate from the crime of operation). The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.

338 S.C. at 187-89, 525 S.E.2d at 878-79 (2000) (emphasis added). The South Carolina Supreme Court has also long held that

an allegedly illegal video gaming machine is deemed an unlawful gambling device at the moment of seizure, *i.e.*, the machine is contraband *per se* because it is illegal to possess and not susceptible of ownership. Moreover, this conclusion is appropriate in light of South Carolina’s long-established statutory prohibitions on the ownership or use of specified gambling devices, including video gambling devices developed in recent years. *See Johnson [v. Collins Entertainment Co.]*, 88 F.Supp.2d [499]...502 n. 1 [D.S.C. 1999] (“[I]egislation designed to control ‘the mischiefs of gambling’ was enacted by the South Carolina colonial legislature in 1712”).

Mims Amusement Co. v. S. Carolina Law Enforcement Div., 366 S.C. 141, 154, 621 S.E.2d 344 (2005). In this matter, the evidence demonstrated not only a mere capability, but actual gambling and cash payouts on the device. Specifically, SLED Agent Wood testified that he personally wagered and gambled on this device during each of his three undercover operations at the location in question. He testified that he “put money in” this Dragon’s Ascent machine, that he “wagered different amounts” during his play, that “the more you wagered the more you stood to win if you

were successful destroying that particular dragon”, and that he “sometimes walked away with more money”. (Tr. p. 94). Further, S/A Wood specifically acknowledged:

This -- this game is pretty simple to me. I could put in whatever amount of money I want to put in and I have the chance to win more money than that. That’s gambling to me. If I can put in a dollar and I’m able to win \$20 that’s gambling. I’m also able to lose that. So you’re able to lose or you might win. You’re gambling your money and that is -- to me that’s the point of this game. If there was no chance of winning money at this game I don’t see any entertainment value for bar patrons. I see there’s games all over bars that don’t offer payouts and they’re not getting paid. When I go in a bar and a game is getting played like this and they’re winning money but they’re playing it because they’re – it’s a gambling.

(Tr. p. 121). The evidence in this matter also indicated a player could win more than \$1,700 for the play of this machine. Special Agent Wood testified that the amount of the “Rainbow Dragon” during his first undercover operation at LG’s By the Creek was “\$614.” (Tr. p. 96). During his second undercover operation at this location, Wood acknowledged that the “Rainbow Dragon” was worth in the “\$700 range”. (Tr. p. 110). During his final undercover operation, Wood recalled that the amount available to win for the “Rainbow Dragon” was “\$1,555.41”. (Tr. p. 115). In court, the value of the “Rainbow Dragon” was “1,783”. (Tr. p. 52). As such, the undisputed evidence in this case proved that there were cash payouts, up to \$1,783, available for the play of this device. As such, because the device offers the mere capability of illegal cash payouts, the device should have properly been considered contraband *per se* and thus illegal to possess regardless of other intended, capable, or other possible uses. Further, as far back as 1929, the South Carolina Supreme Court acknowledged that a “machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition.” Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) *quoting* 27 C. J. 989. However, this Court failed to analyze or address the use or capability analysis required in South Carolina and this decision should be reconsidered.

4. The order improperly renders the phrase “device licensed pursuant to Section 12-21-2720 and used for gambling” in § 12-21-2710 meaningless and redundant to the phrase “other device pertaining to games of chance of whatever name or kind” in § 12-21-2710.

In South Carolina, “we must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,’ for ‘[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.’” Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018). South Carolina Code § 12-21-2710 is the South Carolina Legislature’s determination of the types of machines and devices that are illegal to possess or operate in South Carolina and separately prohibits several different types of machines and devices. Specifically,

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or **device licensed pursuant to Section 12-21-2720 and used for gambling** or any punch board, pull board, **or other device pertaining to games of chance of whatever name or kind**, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance. (emphasis added).

The language of this statute evidences the clear Legislative policy decision to separately prohibit devices “used for gambling” and devices “pertaining to games of chance”. These phrases must have separate meanings to faithfully adhere to the rules of statutory interpretation in South Carolina, it was error for this Court to combine them. Accordingly, this Court’s decision should be amended.

5. The order is contrary to the machine-by-machine forfeiture process in South Carolina and is an improper advisory opinion.

This Court's decision disregards binding South Carolina jurisprudence and attempts to adjudicate Dragon's Ascent machines that have not been seized and are thus not properly before the Court in this action. Put simply, this action involves one Dragon's Ascent machine that was seized by SLED from LG's By the Creek for which the procedures of S.C. Code Ann. § 12-21-2712 were followed. This Court's broad finding that "Dragon's Ascent is a game predominantly based on skill" is clearly intended to improperly adjudicate other Dragon's Ascent machines that have not been seized in accordance with S.C. Code Ann. § 12-21-2712 and are not properly before this Court. This finding is directly contrary to binding South Carolina jurisprudence and South Carolina's machine-by-machine forfeiture process. Specifically, in Allendale Cty. Sheriff's Off. v. Two Chess Challenge II case, the South Carolina Supreme Court found

In the present case, the magistrate ruled on the legality of the two machines before the court and "all those [machines] operating in an identical manner." This broad ruling exceeded the scope of the magistrate's authority and is contrary to the machine-by-machine forfeiture process outlined in the statute and carried out in other cases. Therefore, we find that the magistrate court lacked jurisdiction to determine the legality of machines not before court.

361 S.C. 581, 586–87, 606 S.E.2d 471, 474 (2004). The Court also noted that

As to the two machines seized, examined, and deemed legal, there is nothing preventing the Sheriff's Office or other law enforcement officials from seizing the machines once again for the magistrate's examination. Because video machines may be manipulated so as to change their nature from lawful to unlawful, law enforcement may, based on probable cause, seize the machines in question once again. In other words, the effect of the magistrate's order is that it deems the machines lawful *at the time* they were seized and examined.

Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II, 361 S.C. 581, 587, 606 S.E.2d 471, 474 (2004). This Court's decision is not properly limited to the one Dragon's Ascent machine at issue in this action, nor does it acknowledge that the machine can only be properly adjudicated as it

existed at the specific point in time that it was seized. Put simply, this Court cannot rule on all Dragon's Ascent machines in South Carolina as this is directly contrary to the binding precedent requiring a machine-by-machine seizure process. *See Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (recognizing the decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9.

Similarly, any ruling on a machine that has not been seized and brought before the Court in accordance with S.C. Code Ann. § 12-21-2712 is an improper advisory opinion. The South Carolina Supreme Court has long held that courts have no jurisdiction to "enter the field of advisory opinions." *Power v. McNair*, 255 S.C. 150, 155, 177 S.E.2d 551, 553 (1970). Further, it "is elementary that the courts of this State have no jurisdiction to issue advisory opinions." *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). Therefore, this Court's attempt to improperly exercise non-existent jurisdiction to rule on all Dragon's Ascent machines and issue an improper advisory opinion must be altered and amended to comply with South Carolina's machine-by-machine forfeiture precedent.

6. The order does not give judgment according to the justice of this case as required in magistrate court civil appeals.

"Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all of the parties and for errors of law or fact." S.C. Code § 18-7-170. As noted above, the justice of the case in this instance demands that this court alter its erroneous decision to allow cash payouts on gaming machines because this decision is in direct contravention of the stated purpose of South Carolina statutes designed to prohibit such.

7. The finding that the trial court's interpretation of § 12-21-2710 – a statute that applies to the possession and ownership of gaming machines – could somehow result in the prohibition of local spelling bees, the Heritage Golf Tournament, and the Governor's Cup fishing tournament is clear error.

This Court's reliance on the proposition that interpreting § 12-21-2710 to prohibit gambling and cash payouts on a gaming device could somehow render spelling bees, professional golf tournaments, NASCAR races, fishing tournaments, or country club memberships illegal in South Carolina is clear error that should be reconsidered. Initially, in South Carolina, a "court should... examine the complainant's conduct before analyzing other hypothetical applications of the law." Martin v. Lloyd, No. 2:06-CV-400-DCN, 2011 WL 1261543, at *4 (D.S.C. Mar. 31, 2011), aff'd, 700 F.3d 132 (4th Cir. 2012). Further, "the court should address the games possessed by plaintiffs, not hypothetical games such as Monopoly, solitaire, or cards." Martin v. Lloyd, 2:06-CV-400-DCN, 2011 WL 1261543, *4 n.3 (D.S.C. Mar. 31, 2011). As such, the only relevant question in this case was the legality of the Dragon's Ascent gaming machine on which players stand a chance to win cash prizes that was seized and brought before the Court in accordance with South Carolina law. *See* S.C. Code Ann. § 12-21-2712. The legality of other conduct was simply not relevant. Further, proposition that the payment of a country club membership or an entry fee for a professional sports competition could somehow constitutes a wager is simply without merit. Payment of an entry fee to participate in a professional sports competition stands in stark contrast to a player inserting money into a gaming machine on which a player can use the "Raise Your Shot" button to select between \$.10, .20, .50, 1.00, or 2.00 per shot per play and have that selection directly correlate to the amount the player can win in cash prizes. In addition, this conduct does not in any way involve a machine or any device and therefore would not even fall under the purview of § 12-21-2710 in any conceivable way. Accordingly, this Court should reconsider its decision in this matter.

CONCLUSION

In conclusion, Respondent asserts that the trial court’s finding that this Dragon’s Ascent device, on which individuals wagered, gambled, and received cash payouts, violates § 12-21-2710 was correct and should be upheld. The express purpose of § 12-21-2710 is clear - to prohibit cash payouts for credits earned on gaming machines. *See* 1999 S.C. Act 125. As such, this Court erred by not construing § 12-21-2710 to accomplish this intent. In South Carolina,

[i]f a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation. *Id.* Moreover, “it is beyond this Court’s power to effect a change in the statutes enacted by the Legislature.” State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); *see also* Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does “not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly”).

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007). Further, “[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

The Legislative policy decision of prohibiting cash payouts on gaming has not changed since the passage of 1999 Act 125. Notably, the South Carolina Legislature did in fact amend § 12-21-2710 in May of 2022; however, this amendment did not change the clear prohibition on machines or devices used for gambling nor did it authorize cash payouts on machines in South Carolina. *See* 2022 Act No. 190 (allowing federally licensed South Carolina gaming device manufacturers to produce and sell items to out-of-state jurisdictions).

As such, South Carolina’s longstanding prohibition on cash payouts and gaming machines and devices used for gambling set forth in § 12-21-2710 remains the law applicable to this case. As the record in this matter unequivocally demonstrates that there were cash payouts – up to \$1,783 – for credits earned on the Dragon’s Ascent device in question, the device violates the spirit, intent, and the plain language of § 12-21-2710. Therefore, based upon the foregoing, and any additional reasons to be set forth in any subsequent memorandum of law, any arguments advanced at the hearing on this motion, and all those previous advanced in prior briefing and proposed orders submitted in this matter; the Respondent requests that this Honorable Court alter, amend, and reconsider its Order in this matter and issue a substituted order affirming the magistrates decision that the device in question violates § 12-21-2710 and should be destroyed.

Respectfully submitted,

s/Adam L. Whitsett

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ATTORNEY FOR THE SLED

Columbia, South Carolina
March 9, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price., Circuit Court Judge

Case No. 2022-CP-08-02026

1 Dragon's Ascent Video
Gaming Machine; SC Games
of Skill, LLC.

Respondents,

v.

South Carolina Law
Enforcement Division (SLED)

Appellant.

NOTICE OF APPEAL

The South Carolina Law Enforcement Division hereby appeals the order of The Honorable Bentley D. Price dated February 27, 2023 and the order denying reconsideration of the same dated April 3, 2023. Appellants received electronic notice of the entry of these orders on the same dates, respectively. Copies of both orders are attached hereto.



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STATE OF SOUTH CAROLINA
IN THE MAGISTRATE'S COURT
COUNTY OF BERKELEY
SOUTH CAROLINA STATE LAW
ENFORCEMENT DIVISION (SLED),

Plaintiff,

vs. CASE NO. 2021-cv-0810602903

1 "DRAGON'S ASCENT" VIDEO GAMING
MACHINE, SC GAMES OF SKILL, LLC,
Defendants.

HEARING BEFORE: THE HONORABLE RAD S. DEATON,
JUDGE

DATE: February 4, 2022

TIME: 9:27 AM

LOCATION: Magistrate's Court
303 B North Goose Creek Blvd.
Goose Creek, SC

REPORTED BY: Priscilla Nay,
Court Reporter

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Richard L. Tapp, Jr., Esq.

(INDEX AT REAR OF TRANSCRIPT)

1 (PLAINTIFF'S EXHIBIT 1, Color
2 photograph, was premarked for identification.)
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4 photograph, was premarked for identification.)
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25 (DEFENDANT'S EXHIBIT 1, TAB 1, Office

1 of the Attorney General of the District of Columbia
2 Opinion (with original affidavit), was premarked
3 for identification.)

4 (DEFENDANT'S EXHIBIT 1, TAB 2,
5 Curriculum vitae of Nick Farley, was premarked for
6 identification.)

7 (DEFENDANT'S EXHIBIT 1, TAB 3, Expert
8 report with appendices including help instructions,
9 was marked for identification.)

10 (DEFENDANT'S EXHIBIT 1, TAB 4,
11 Curriculum vitae of Brock Smith, was marked for
12 identification.)

13 (DEFENDANT'S EXHIBIT 1, TAB 5, Copies
14 of Dragon's Ascent tickets, was marked for
15 identification.)

16 THE COURT: This is the case of SLED
17 versus one Dragon's Ascent video game machine. I
18 reviewed y'all's briefs and all. So I know kind of
19 what's going on. I'll be happy to hear from y'all
20 if you want to give opening statements or whatever
21 or if you want to just start calling witnesses.

22 Any request to sequester any of these
23 witnesses? I assume most of these people in the
24 courtroom are witnesses.

25 MR. McCOY: I don't think we have

1 an issue.

2 MR. WHITSETT: There are three
3 witnesses. I don't have a lot of heartburn on
4 sequestration.

5 THE COURT: Well, that's fine. I just
6 asked. It doesn't matter to me.

7 MR. McCOY: Judge, a couple -- before
8 we do get started, a couple of brief housekeeping
9 matters. I have discussed with Adam -- we have
10 put together a book of not only for you and for
11 witnesses who are on the stand but also for
12 opposing counsel that has CVs in them as well as
13 expert reports --

14 THE COURT: Okay.

15 MR. McCOY: -- and Adam was okay if we
16 admit these. And I'll -- and I'll -- with you
17 having a copy as well as long as we kind of lay
18 the foundation. This will be Defense Number 1.

19 THE COURT: Okay.

20 MR. McCOY: Judge, we'll lay the
21 foundations for the reports that are inside. I
22 just wanted --

23 THE COURT: You already have them
24 marked or you wanted me to --

25 MR. McCOY: Well, it's going to be --

1 it's going to be State's 1, but there are -- there
2 are hybrids that are inside.

3 THE COURT: State's 1 or --

4 MR. McCOY: Defendant's 1.

5 THE COURT: I know the --

6 MR. McCOY: I'm used to saying that on
7 the other end.

8 THE COURT: You're a walking conflict
9 of interest.

10 MR. WHITSETT: That's accurate,
11 Your Honor. It's subject to them actually
12 authenticating these. I didn't have a problem
13 with them doing it en masse as one.

14 THE COURT: You've got stickers or --

15 MR. TAPP: Yes, Your Honor. May I
16 approach?

17 THE COURT: Yes.

18 MR. TAPP: I'll hand you your set.

19 THE COURT: Just move the --

20 MR. TAPP: There's one for the witness
21 and one for --

22 THE COURT: If you forget to move
23 the -- so y'all have the originals marked
24 somewhere. All right. Good -- if you forget to
25 move them in --

1 MR. McCOY: There's one original that
2 is in your package, Judge, and that is -- and we
3 wanted to kind of --

4 THE COURT: In here?

5 MR. McCOY: Yes, sir. It should be
6 Tab Number 1.

7 MR. TAPP: May I approach, Your Honor?

8 THE COURT: Tab Number 1 is just the
9 evidence list. Are you talking about that?

10 MR. TAPP: At the end, Your Honor, in
11 the --

12 THE COURT: I got you. The
13 certificate?

14 MR. TAPP: That's actually the
15 original, Your Honor.

16 MR. McCOY: Judge, we didn't know if
17 you preferred for that to be admitted for your
18 purposes or for the court reporter's purposes or
19 where.

20 THE COURT: I don't know that I -- I
21 mean, if you're introducing it into evidence it
22 needs to be evidence.

23 MR. TAPP: Okay.

24 THE COURT: So if you want it back -- I
25 mean, you've got a copy of that in here. Right?

1 MR. McCOY: We do. We just wanted to
2 make sure the Judge had the original.

3 THE COURT: That's fine. We'll keep
4 all the evidence together. So once y'all -- I
5 mean, is it -- is it agreed upon that it's going to
6 be into evidence?

7 MR. WHITSETT: Subject them to them
8 laying the foundation -- we're not going to
9 stipulate at this point subject to the proper
10 authentication.

11 THE COURT: I mean, I read the -- so I
12 kind of know where everybody's coming from --

13 MR. WHITSETT: Absolutely.

14 THE COURT: -- but, I mean, it looks to
15 be just the -- yeah. It's just a sealed document.
16 So you don't have to bring some records custodian
17 from DC down here, right?

18 MR. TAPP: That's right.

19 THE COURT: Yeah. I mean, if you need
20 to put that into evidence then y'all just take it
21 and just, you know, put it into evidence.

22 MR. McCOY: Sounds great, Judge. Thank
23 you. Anything else you think you need from us in
24 terms of preparation before we start, Your Honor?

25 THE COURT: No. Any motions or issues

1 I need to take up that y'all want to -- want me to
2 take up?

3 MR. McCOY: None on the defense side,
4 Your Honor.

5 THE COURT: Okay. All right.

6 MR. WHITSETT: No, Your Honor. Not
7 from the Plaintiff.

8 THE COURT: Okay.

9 MR. McCOY: Thank you, Judge.

10 THE COURT: All right. All right. You
11 can call your first witness.

12 MR. WHITSETT: Judge, I think we were
13 planning on doing brief opening statements --

14 THE COURT: No. That's fine.

15 MR. WHITSETT: -- just to lay the
16 groundwork --

17 THE COURT: All right.

18 MR. WHITSETT: -- when I spoke with
19 Peter yesterday.

20 MR. McCOY: Yes. Brief openings, Your
21 Honor.

22 THE COURT: All right. Well, I'm happy
23 to hear it.

24 MR. WILKINS: Good morning, Your Honor.

25 THE COURT: Yes, sir. Good morning.

1 MR. WILKINS: I had some prepared
2 remarks to make for the Court this morning, but
3 I'm going to forego the great majority of those
4 remarks in view of the fact that we agree with
5 SLED that the corporate standard in this case to be
6 applied in judging the issues is the dominant
7 factor test.

8 The issue and the only issue before
9 this Court applying that standard is whether or not
10 to Dragon's Ascent is in violation of 12-21-2710.
11 Throughout the United States the great majority of
12 states as I'm sure Your Honor knows follows the
13 predominant factor test, but the question becomes
14 if you want to have the same machine in involved
15 in states when you reach the dominant factor.

16 The second issue becomes if skill is
17 involved how much skill is necessary to overcome
18 any possible chance. This is something that has
19 been litigated throughout the United States on a
20 case-by-case basis.

21 In New Jersey, for example, the
22 dominant factor test is called the material
23 degree test. In New Hampshire it is called risk
24 of something contingent on another event or the
25 contingency test. In Kansas it's the bona fide

1 contestant case -- test. New York uses the
2 dominant factor test. In North Carolina it's the
3 controlling factor test.

4 Virginia uses a matter of chance test.
5 In Texas it's partially based on chance and so
6 forth. So what the -- the manufacturer of Dragon's
7 Ascent was faced with these issues and wanted to
8 comply with the law in every state with the same
9 machine.

10 So he tasked the chief computer expert
11 in his company, Brock Smith, who's in the courtroom
12 today with the task of coming up with a machine --
13 designing a machine that does two things. One,
14 it's entertaining. Two, it's one hundred percent
15 based on skill to the exclusion of any chance.

16 Of course, that would meet the dominant
17 factor test. But his goal was to do more than just
18 meet the test that is applicable here in South
19 Carolina and in most of the states.

20 Brock and his team went to work and it
21 literally took them a little over five years to
22 design this machine that you have in your courtroom
23 today. It was designed and tested and redesigned
24 and tested over a period of five years to come up
25 with a machine that is 100 percent based upon

1 skill. I believe that from the testimony and the
2 demonstrations that we will convince this Court
3 that the design meets this test -- the 100 percent
4 skill test -- with flying colors. Thank you, Your
5 Honor.

6 THE COURT: Okay. Thank you.

7 MR. WHITSETT: Thank you, Your Honor.
8 May I remove this to speak?

9 THE COURT: Sure.

10 MR. WHITSETT: Good morning. May it
11 please the Court. My name is Adam Whitsett. I'm
12 General Counsel at SLED.

13 THE COURT: You don't have to leave
14 that there. I don't know if y'all wanted that
15 there. That's fine. I don't care. It doesn't
16 bother me. Wherever y'all --

17 MR. WHITSETT: Your Honor, we believe
18 the evidence in this case will show that this
19 device which is clearly designed to allure players
20 to gamble violates both the spirit and the intent
21 of South Carolina's gambling and gaming laws.

22 Make so no mistake. 12-21-2710 sets
23 forth a number of categories of illegal machines in
24 the State of South Carolina, notably any device
25 used for gambling, any device pertaining to games

1 of chance of whatever name or kind, or any device
2 with a free-play feature. These are three separate
3 and independent categories and if a machine meets
4 any of these clearly defined prohibitions it is
5 illegal and violates 12-21-2710.

6 We believe that the actual evidence
7 when viewed through the lens of actual players will
8 clearly demonstrate that this is a -- a device that
9 is prohibited by all three categories. It meets
10 every single one. Again, the allure is the chance
11 to win money. The chance to win money, something
12 in addition. That is specifically what these laws
13 were designed to prohibit.

14 We believe that that is the point of
15 this machine, right? It's to make money. The
16 entire business model for this device is to make
17 money.

18 The entire marketing structure is to
19 make the establishment money, the machine owner
20 money. And that only happens when players are
21 unsuccessful and they know that because that's the
22 way it's designed. That's the way that you make
23 money on these devices.

24 The selling point is the gambling, is
25 individuals taking a chance to win more money and

1 unsuccessfully doing so thereby making money for
2 all of the other -- the location, machine owner and
3 all of the above. I know the Supreme Court has
4 defined the statutory word gambling in South
5 Carolina. It really analyzed it but defined it
6 to say, look, the wager is the ball game.

7 Can I increase by playing the -- do
8 I put money in? Does the wager -- it's not in
9 the gambling context as much the skill/chance
10 ratio. It is the wager and we believe this device
11 clearly affords players the ability to make a
12 wager. It's got a button that does that and we'll
13 establish that.

14 So I submit that in and of myself
15 itself -- the wager -- makes this a gambling
16 device. I'm also confident that the evidence will
17 prove that this is a game on which chance
18 predominates for players.

19 Make no mistake. This device has
20 functionality based solely on that, based on
21 unsuccessful play. It accounts for it. So we
22 will establish that.

23 The fact remains and the evidence will
24 establish that a player can successfully target
25 and hit a dragon and not get a reward. Successful

1 play and no result, that is not skill. That is not
2 a game of skill. The evidence will also show that
3 employing the same skills will result in different
4 amounts and different returns. Again, not skills.

5 So the true test of this would be to
6 get ten people. Let them play. Let them start
7 with the same amount.

8 There's no chance that they're going to
9 return the same amount and their return is going to
10 based entirely on the device itself, what board
11 happens to be presented by the device itself, which
12 to those players is completely random.

13 So we believe that this will clearly be
14 established when you look at it through the lens
15 of the target audience for this machine: South
16 Carolina bar patrons and South Carolina restaurant
17 patrons. It will establish that chance is the
18 predominant factor for every one of those players
19 and whether they are ultimately successful in
20 chasing that high value, in going after that
21 jackpot. Now, I can go one step further. I
22 believe the evidence will show undisputably there
23 are -- there's functionality of the machine that
24 takes all actual skill out of the play. The
25 lock-on function means the player doesn't even have

1 to -- to target it. When you play that function
2 the machine itself is going to select between
3 similarly situated dragons. It's going to decide
4 for you. You don't have even the option to do
5 that. So we believe that just renders the skill
6 argument meritless and when looked at it from that
7 lens the chance clearly will predominate on the
8 play of the machine in that regard.

9 At the end of the day this machine
10 also has a progressive jackpot, a function that
11 is designed knowing that players will play
12 unsuccessfully. So the -- it increases with
13 unsuccessful play. So when I start and play a
14 machine -- the machine today the maximum my amount
15 wins is a number.

16 When I go three weeks later it's a
17 different number. I'm the same person and play
18 with the same skill. I stand to win more money the
19 next time.

20 There's nothing different from me.
21 That is not skill. In fact, the machine is
22 designed to provide an account for that. In
23 addition the evidence will show clearly this
24 machine has a free-play feature. It's got free
25 plays. There's no dispute on that. It's

1 indisputable. So it's got a free play feature
2 which in and of itself renders the device in
3 violation of South Carolina law. So as we look at
4 this I would ask that you incorporate the Supreme
5 Court's guidance on the proper lens.

6 Let's look at this in practical
7 operation, in practical application from the target
8 audience because I believe when you do that it will
9 be clear that chance predominates for every single
10 one of those players. Would there ultimately be a
11 market anywhere if players won every time? No,
12 there would not.

13 There could not. No South Carolina
14 restaurant -- LG's By the Creek -- would not put
15 this in if it stood to lose money every time.
16 Finally, I believe the evidence will demonstrate
17 that this machine has different versions, different
18 settings, and can be modified.

19 We can -- we'll show you where the
20 joystick can be modified. So even at the end of
21 the day in this unrealistic world in which someone
22 ultimately did somehow learn the game it's
23 modifiable. It's changed. So that argument just
24 goes completely out the window. Thank you.

25 THE COURT: All right. First witness.

1 MR. McCOY: Thank you, Your Honor. The
2 defense would call Nick Farley first.

3 NICK FARLEY
4 being first duly sworn, testified as follows:

5 THE COURT: Your witness.

6 MR. McCOY: Thank you, Your Honor. May
7 it please the Court.

8 EXAMINATION

9 BY MR. McCOY:

10 Q. Nick, great to see you again. My name
11 is Peter McCoy for the record and we have had the
12 opportunity to talk before today's date. Is that
13 accurate?

14 A. That is correct, yes.

15 Q. And, Nick, before we do get started
16 here today tell the Judge a little bit about
17 yourself. How old are you?

18 A. I'm 56 years old.

19 Q. Nick, where are you from?

20 A. Well, I have dual residence. I spend
21 most of my time in Henderson, Nevada and I also
22 have a home and a business in Solon, Ohio.

23 Q. Okay. So you travel around a good bit
24 and you've got houses in different locations. Is
25 that accurate?

1 A. I do.

2 Q. Okay. Nick, where did you have to
3 travel from to be here with us here today?

4 A. I traveled from Nevada.

5 Q. Okay. I found that out the hard way
6 when I called you three hours on the way.

7 A. That's okay.

8 Q. I appreciate your patience with me on
9 that.

10 A. Sure.

11 Q. Nick, how about tell the Court a little
12 bit about your educational background.

13 A. Certainly. I have a bachelor of
14 engineering degree in electrical engineering and
15 computer science from Stevens Institute of
16 Technology. I graduated in 1987 almost 35 years
17 ago now and I've been engaged since graduating in
18 the practice of testing and evaluating electronic
19 gaming devices since I got out of school.

20 Q. So you've been doing it for over
21 35 years roughly?

22 A. Yes, I have.

23 Q. Okay. Your background and your
24 training from not only your college degree but also
25 potential other businesses that you worked for

1 lends to that same credence, correct?

2 A. Yes. When I graduated from school I
3 went directly to work with the New Jersey Division
4 of Gaming Enforcement in Atlantic City where I was
5 a test engineer in the autonomic games section
6 testing gaming devices in Atlantic City casinos.
7 I was technically a state regulator.

8 After working with them for four years
9 I accepted employment with what was a start-up
10 company called Gaming Laboratories International.
11 They engaged in the testing and evaluation of
12 electronic gaming devices with headphones for use
13 in gaming facilities throughout the world.

14 I was involved in inspecting the
15 machines that were used in over 150 casino openings
16 throughout the -- the nation and throughout the
17 world. I helped that company open offices not only
18 in their New Jersey headquarters but in Australia,
19 South Africa and in Colorado when I was employed
20 there.

21 I helped establish a lot of the testing
22 methods that are still in use today. Almost 22
23 years ago my wife's father fell ill and she wanted
24 to move back home to Ohio which caused me to leave
25 my employment with GLI and start my own business.

1 That's Nick Farley & Associates. We do business
2 known as Eclipse Compliance Testing and we've been
3 in business now for -- we're in our 22nd year.

4 Q. Congratulations on that.

5 A. Thank you very much.

6 Q. Fantastic job. The business you just
7 mentioned, Farley & Associates, where is that
8 located?

9 A. Solon, Ohio.

10 Q. Okay. Part of your duties in
11 evaluating gaming devices which obviously you've
12 done for your entire career -- do you ever go to or
13 attend any kind of continuing education that helped
14 you kind of keep up to standard or up to date with
15 certain things and new technologies that have come
16 out in the nation today?

17 A. Well, we work very closely with our
18 customers, the manufacturers of gaming devices, to
19 keep up to date on what they're developing and what
20 they're using. We regularly attend trade shows and
21 conferences in the industry to keep up to date on
22 new technologies coming about, new regulatory
23 issues that are arising and new regulatory
24 practices that are being used in the industry.

25 Q. Would you say that you are efficient in

1 computer programming languages?

2 A. Yes. My background is in electrical
3 engineering and computer science. I am familiar
4 with computer programming languages.

5 We do that on a regular basis in our
6 office. We analyze other people's code. On
7 occasion we have to write our own code and we do
8 that. Yes.

9 Q. Okay. And in that same vein would you
10 say you're also proficient in operating systems?
11 Gaming operating systems.

12 A. Yes.

13 Q. I've looked up your CV. I've looked
14 at your background. Can you tell the Court or
15 fill them in a little bit about some of your
16 achievements throughout your career and maybe
17 some places that you've also spoken to as well.

18 A. Sure. Sure. I speak at gaming
19 conferences when necessary, when requested. Gaming
20 regulator conferences, gaming industry conferences.

21 I have provided articles for some of
22 the trade magazines when requested. It was about
23 10 or 11 years ago I was honored by the Oklahoma
24 Indian Gaming Association with an award -- it's
25 called the Warrior's Award -- for lifetime

1 achievement and I'm still going. So --

2 Q. Congratulations.

3 A. -- I guess my time hasn't ended yet.

4 Then my company has won several award as well.

5 We won an awards for best exploring business in the

6 Cleveland area and we've won some minor awards like

7 best code laboratory in the Cleveland area and

8 stuff like that.

9 Q. Fantastic. Thank you for that, Nick.

10 So the Court is aware, have you ever testified as

11 an expert before in evaluating gaming devices?

12 A. Yes, I have. Many times.

13 Q. Have you done that -- if you were to

14 give the Court an estimate or a guess how many

15 times do you think that would be?

16 A. More than 50 times.

17 Q. Okay. And is that nationwide?

18 A. Yes, it is.

19 Q. Multiple jurisdictions?

20 A. Yes, it is.

21 Q. Have you specifically testified in

22 South Carolina as an expert in evaluating gaming

23 devices?

24 A. I have done work in South Carolina

25 before. Yes, I have testified.

1 Q. And when you have testified as an
2 expert in South Carolina who has that been before
3 for?

4 A. I know early on in my business we
5 actually did work for SLED and for the Attorney
6 General's office and South Carolina Department of
7 Revenue.

8 Q. So you've testified as an expert for
9 both sides --

10 A. Yes.

11 Q. -- in South Carolina? In the courts of
12 South Carolina.

13 A. Yes, I have.

14 Q. And when we say courts of South
15 Carolina it's Magistrate's Court, Circuit Court and
16 statewide courts?

17 A. Yes.

18 Q. And is your current business approved
19 as an independent gaming testing authority?

20 A. Yes. We are in more than 250
21 jurisdictions around the world.

22 Q. That's 250 jurisdictions around the
23 world. We're talking about not just in the United
24 States but also foreign jurisdictions?

25 A. Yes.

1 MR. McCOY: May I approach the witness,
2 Your Honor?

3 THE COURT: Sure.

4 BY MR. McCOY:

5 Q. Nick, we have handed up to you what we
6 have labeled as Defense Exhibit 1. We have given a
7 copy of this as well to the Plaintiff's side of
8 this. If you were to open up to our tab that is
9 labeled Number 2. Do you recognize what that is?

10 A. Yes. It's a copy of my curriculum
11 vitae.

12 Q. Would you say that what you have in
13 front of you as Tab Number 2 on Defendant's Exhibit
14 1 -- is that a fair and accurate representation of
15 your CV?

16 A. Yes, it is.

17 MR. McCOY: Your Honor, at this point
18 in time I would move Defendant's Exhibit Number 1,
19 Tab Number 2, into evidence.

20 MR. WHITSETT: Without objection, Your
21 Honor.

22 THE COURT: All right. Defendant's
23 Exhibit 1, Tab Number 2 into evidence without
24 objection.

25 (Defendant's Exhibit Number 1, Tab 2 in

1 evidence.)

2 MR. McCOY: Thank you, Your Honor. And
3 also at this time I would -- I would take this
4 opportunity to move Mr. Nick Farley in as an expert
5 on evaluating gaming devices based on his testimony
6 of previous expert testimony.

7 THE COURT: Any objection?

8 MR. WHITSETT: No objection, Your
9 Honor.

10 THE COURT: So evaluation of gaming
11 devices, correct?

12 MR. McCOY: That's correct, Your Honor.

13 THE COURT: All right. He's qualified
14 without objection.

15 MR. McCOY: Thank you, Your Honor.

16 BY MR. McCOY:

17 Q. Mr. Farley, were you retained to do an
18 evaluation or to analyze a game called Dragon's
19 Ascent?

20 A. Yes, I was.

21 Q. And when were you engaged to do this?

22 A. Well, we've been asked to review
23 various versions of Dragon's Ascent over the past
24 few years. I believe the most recent was at the
25 end of 2021.

1 Q. Okay. And -- and with you being
2 here today and you being asked to analyze Dragon's
3 Ascent are you being paid to -- to formulate an
4 opinion on this?

5 A. Yes.

6 Q. Okay. And are you being paid how?

7 A. I'm being paid hourly.

8 Q. Okay.

9 A. Hourly plus expenses.

10 Q. Okay. Is there a bonus involved with
11 your payment as to how the outcome of this case
12 prevails?

13 A. No. None of my -- none of my fee is
14 contingent upon the result.

15 Q. Okay. And let's educate the Court
16 for a second. When you are asked to look at or
17 evaluate a game -- any kind of gaming system, let
18 alone Dragon's Ascent -- what are the first steps
19 that you take into a business?

20 A. Well, when we analyze a game like
21 Dragon's Ascent we try to -- we try to take a
22 logical and deliberate approach to things. When we
23 look at the game itself we look at it from three
24 different perspectives. One is the player's
25 perspective, how the player plays the game, how the

1 player engages in the game, what features are
2 available to the player.

3 The second perspective we look at is
4 from the operator's perspective, what features
5 and -- what -- what things can the operator
6 control?

7 Are there any features or options that
8 they can change and what do they do and have -- do
9 they affect the character of the game?

10 Then we look at it from the
11 manufacturer's perspective. How was the game
12 designed? What can it do? What are they intended
13 to do?

14 Then as we go along in the process
15 we engage in gameplay. We engage in different
16 configuration settings. We also review the
17 software source code which is provided to us from
18 the manufacturer.

19 Q. A lot of that stuff is over my head; so
20 I'm glad we've got you over here to explain some of
21 that.

22 A. Sure.

23 Q. For us to break it down a little bit,
24 when you play this game or you examine this game
25 and your team does so do you give an exhaustive

1 kind of description of -- of the characters in the
2 game, the point of the game and what the player
3 actually does while they play the game?

4 A. Yes, we do. We -- we write a very
5 comprehensive report on -- we identify the software
6 in the game.

7 We identify the different components of
8 the game and then we write up a description of how
9 the game is -- how the game is played, how it's
10 operated, what options and features are available,
11 all the different ways the player can engage in the
12 game and then try to address any questions that are
13 raised from us by legal counsel to try and help
14 them render a legal opinion.

15 Q. And in your examination of the game
16 if you could educate the Court what more or less --
17 how do you describe this game?

18 What's the point
19 of this game?

20 What does the player actually try
21 to do?

22 A. Well, the player is engaging in
23 Dragon's Ascent throughout a lot of different
24 features. I mean, the most obvious way to play
25 the game is simply to aim and shoot, but it goes a

1 little beyond that in that there's a help screen
2 that kind of helps the player identify the
3 different creatures that pass by, how they are
4 grouped and how -- what their value is.

5 There are five vials next to the turret
6 where the player would shoot from. Those vials
7 are basically strength power and players become --
8 as -- as they read the rules and as they engage in
9 gameplay they become familiar with what that
10 strength power leader and those vials mean and how
11 each vial is associated with a different group of
12 dragons. There is a lock-on feature.

13 When you become familiar with the
14 lock-on feature you realize that you can identify
15 different creatures on there and what it would take
16 to capture that creature. You can select features
17 with the -- creatures with the lock-on feature and
18 then try it.

19 When they come across on the screen the
20 lock-on feature automatically draws a line to it
21 and allows the player to bypass any other creatures
22 that may be in the path and shoot directly at those
23 creatures to try and reduce the health of that
24 creature and ultimately capture that creature. So
25 there's a lot of strategy that goes into this game.

1 The more you learn about it the more you apply the
2 strategy. It's a little bit different than the
3 games of the 1980s that I played as a teenager like
4 Defender, Millipede and all of that when you're
5 just basically aiming and shooting and trying to
6 knock things off that. This is a little bit more
7 strategic in that perspective.

8 Q. Okay. How would you describe to the
9 Court a player's success? What is a success in
10 this game and what is a win in this game?

11 A. Well, ultimately success in its
12 most elemental form is the capturing of a dragon, a
13 creature as it grows across, for which you would be
14 awarded a financial prize.

15 Players that become more familiar with
16 this can become successful in that their -- their
17 prize value would exceed the cost to capture the
18 dragon. So ultimately you'd like to try and walk
19 away with a financial gain which is possible
20 because it is all under the player's control.

21 Q. Okay. And would you describe success
22 in this as a -- as a skill that a player uses?

23 A. Absolutely.

24 Q. And the more time you spend with this
25 gaming device -- specifically Dragon's Ascent --

1 the more times you play it does your skill
2 increase?

3 A. Yes. There is definitely a learning
4 curve to this game and as you -- as you play it and
5 become more familiar with the features and the
6 strategies behind this you can improve upon your
7 skill and your -- your game results and outcomes.

8 Q. Okay. And -- and backing up a little
9 bit, when we were looking at examining Dragon's
10 Ascent you're taking a look at a handful of
11 characteristics. Is that accurate to say --

12 A. Yes.

13 Q. -- of the game?

14 A. I would say so.

15 Q. Are you looking at the player
16 instructions or the help screen when you're
17 examining this game?

18 A. Absolutely. Yes.

19 Q. When you're learning about that you're
20 examining that when that happens?

21 A. Yes.

22 Q. Would you also say you're taking an
23 examination of the hardware such as the player
24 controls, the internal mechanisms that kind of
25 include ticket printers, bill acceptors, LCD

1 screens and CPU running kind of systems? Are you
2 looking at all those when you're doing your
3 examination?

4 A. Yes, we are.

5 Q. And you're also taking a looking at
6 software from a couple of different angles, right?

7 You're taking a look at it from an
8 operations standpoint -- is that accurate?

9 A. Yes.

10 Q. -- as well as from a source code
11 standard. Is that accurate?

12 A. Yes, it is.

13 Q. And that's part of your analysis when
14 you're looking at any gaming system. Is that
15 correct?

16 A. That is correct, yes.

17 Q. Would you say what you do, Nick, and
18 what you're asked to do in analyzing games -- is
19 something that's regularly asked in this industry?

20 A. Yes, it is.

21 Q. Okay.

22 A. There aren't many independent
23 laboratories that do what we do, but what we do is
24 sought after by a few different industries. The
25 casino gaming industry obviously utilizes our

1 services and the services of independent testing
2 laboratories to ensure the integrity of games going
3 in casinos and the skill-based industry utilizes
4 our services to ensure that their games meet
5 jurisdictional requirements and laws regarding
6 skill and that their -- their games don't fall
7 afoul and become gambling devices.

8 Q. Understood. So again, just so I
9 understood you correctly, this is a regular and a
10 routine thing that is done in your industry?

11 A. Yes, it is.

12 Q. Okay. In examining Dragon's Ascent
13 does it contain any random number generators that
14 your team uncovered?

15 A. No. It does not.

16 Q. Does it have any compensating
17 algorithms that impact kind of how a player plays
18 or the overall results?

19 A. No, it does not.

20 Q. When you are also looking at this
21 machine and you're examining the machine with your
22 team do the sequences -- the rewards, are they
23 changed or can they be manipulated at all?

24 A. No. They cannot.

25 Q. And this is something that your team

1 spent thorough time investigating and looking at
2 when it comes to Dragon's Ascent?

3 A. Yes, we did.

4 Q. When you were also taking a look at
5 this machine and you spent time with this machine
6 you also prepared a report to -- to your findings.
7 Is that accurate?

8 A. That is correct, yes.

9 MR. McCOY: Your Honor, I'm not going
10 to approach at this time, but I would ask the
11 witness to take a look at Defense Exhibit 1 and
12 this is going to be Tab Number 3 --

13 THE WITNESS: Yes, sir.

14 MR. McCOY: -- for the Judge's
15 knowledge as well as the Plaintiff's knowledge.

16 BY MR. McCOY:

17 Q. So this -- is this a fair and accurate
18 representation of the report that you created?

19 A. Yes, it is. This is a copy of the
20 report that we prepared and issued on December 9th,
21 2021 regarding the review and analysis of the
22 Dragon's Ascent System Version D -- as in dog --
23 A -- as in apple -- 1.05.02 GEN 12399.

24 Q. Okay. In walking through your report,
25 Mr. Farley, obviously you've covered a lot of what

1 you've outlined already which is Section 1 --

2 A. Yes.

3 Q. -- which is what you did here or kind
4 of what you examined.

5 A. That's correct.

6 Q. We have taken a look at Section 2.

7 A. Yes.

8 Q. We've taken a look at Section 3 --

9 A. Yes.

10 Q. -- already. What I do is I would like
11 to turn your attention -- and I would also add
12 you've gone through, I believe, Section 4 in your
13 testimony already.

14 A. Yes, sir. For the most part, yes.

15 Q. And would you describe what you put
16 in -- in -- in your report, you know, as an
17 exhaustive analysis of not only what you've done
18 but also the particular characters that are
19 involved in this game. Is that accurate?

20 A. Yes. We did our best effort to try and
21 give as much disclosure as we possibly could on the
22 aspects and operations and characters and features
23 of this game.

24 Q. Again, I believe you also covered
25 Section 7 which is the system software information

1 in this game. Is that accurate?

2 A. Yes, we did.

3 Q. The only thing we have not talked
4 about in court here today -- I would take you to
5 Section 8 which would be your findings and
6 conclusions.

7 A. Yes.

8 Q. Explain the Court what you found after
9 your careful analysis of Dragon's Ascent.

10 A. Certainly. I mean, we've -- we've
11 found that the Dragon's Ascent version that I
12 mentioned earlier is identical to the version that
13 we have here in court today. I'm pointing to the
14 terminal on the other side of the room.

15 The two-player -- it's a two-player
16 cabinet. It's the same cabinet that we analyzed.
17 It accepts cash as a form of payment to establish
18 credits on the machine. A player uses those
19 credits to engage in gameplay by identifying
20 dragons or creatures as they pass by on the screen
21 and they can fire at those creatures and try to
22 capture them.

23 When they capture them they receive
24 points. Those points are available for cash. The
25 outcome is based on the player's skill and

1 dexterity and their visual hand-eye coordination in
2 an effort to try and identify those creatures and
3 utilize different strategies to try and capture the
4 creatures that they desire and try to win a cash
5 prize.

6 It's up to the player to determine
7 whether the accumulation of the cash prize will
8 exceed what they put into the machine or whether
9 it will be the same or less.

10 Q. And in your conclusions, Mr. Farley,
11 did you and your team come up with a professional
12 opinion or, you know, an expert opinion based on a
13 reasonable degree of scientific certainty?

14 Is this a game of skill or is it a game
15 of chance?

16 A. In our professional opinion we would
17 say that this is a game of skill.

18 Q. In further examining that would you
19 say this is a game of 100 percent skill or partial
20 skill? Is there any mixture at all of chance
21 involved in this?

22 A. I would say that it's a hundred percent
23 skill. It's definitely predominantly skill.

24 MR. McCOY: Okay. Your Honor, based
25 on the testimony that we have gotten here today

1 from Mr. Farley and based on his analysis and
2 expert report that you now have in front of you
3 as well that's at Tab Number 3 I would move that
4 Mr. Farley's expert report that's an Tab Number 3
5 be moved into evidence.

6 THE COURT: Any objection?

7 MR. WHITSETT: Your Honor, I would like
8 to ask a few questions about that prior to or sort
9 of voir dire before we allow the report in.

10 THE COURT: Any objection to that?

11 MR. McCOY: I don't have an objection.
12 No, sir.

13 MR. WHITSETT: Mr. Farley --

14 THE COURT: Are you done with your
15 questioning first --

16 MR. McCOY: Judge, I'm happy if he
17 wants to ask his --

18 THE COURT: -- before we move that in.
19 All right. I wanted to make sure we -- all right.

20 EXAMINATION

21 BY MR. WHITSETT:

22 Q. Mr. Farley, you said you did expert
23 analysis?

24 A. Yes.

25 Q. Did you ever watch an actual bar patron

1 at LG's by the Creek play this?

2 A. I have never been to LG's by the Creek.

3 Q. So you have no testimony regarding
4 anyone that's actually played this device in this
5 location, correct?

6 A. Not at LG's, no.

7 Q. Right. And so nothing in your report
8 is based on watching anyone at this location
9 actually play this machine, correct?

10 A. I have not seen patrons at LG's by the
11 Creek play that, right.

12 Q. Okay. So nothing that you've got in
13 here at all shows how anyone that has actually
14 played this device played this device. Correct?

15 A. I can't say that. I mean, what we
16 wrote in the report is how the game was designed,
17 how the game was played in our laboratory and how
18 the game is -- is intended to be played.

19 Q. Certainly, and I appreciate that.

20 A. Sure.

21 Q. But you don't have anything as to how
22 it's actually played?

23 A. I have not observed patrons play the
24 game.

25 Q. Did you actually analyze this device?

1 A. I observed a device in our laboratory
2 with the same software.

3 Q. But not this particular device?

4 A. Other than a few seconds which I
5 observed Mr. Smith engage in gameplay this morning
6 to ensure that the machine was working I have not
7 engaged with them.

8 Q. So you've never inserted the keys to
9 this device and looked at any of the menus or
10 settings or functions on this one?

11 A. I have not.

12 Q. So your report doesn't have any
13 beneficial information as to how anyone has
14 actually played this device in this location,
15 correct?

16 A. I would not agree with that.

17 Q. But you've never seen anyone actually
18 play this, correct?

19 A. Oh, I've seen people play it.

20 Q. Not in this location?

21 A. Not at LG's, no.

22 Q. Let me ask you this. You also said
23 that you looked at it with a view to meet state
24 standards?

25 A. No, I did not.

1 Q. What did you say that included the word
2 state standards?

3 A. My laboratory engages regularly in the
4 review of gaming devices for compliance with state
5 standards.

6 Q. But you did not do that in this case?

7 A. To my knowledge there are no state
8 standards. There's no regulatory standard around a
9 game of this type.

10 Q. Okay. So that testimony related to
11 South Carolina and this device is meaningless?

12 A. No. I mean, there were no criteria.
13 There were no regulatory -- there's no regulatory
14 oversight in South Carolina on these types of games
15 that I'm aware of. So our examination was a
16 technical assessment to assist legal counsel with
17 their legal opinion on this.

18 Q. Certainly. But you didn't have any
19 South Carolina laws in mind when you rendered that,
20 correct?

21 A. Oh, no. We knew that this report was
22 going to be part of this hearing in South Carolina.
23 So --

24 Q. But you just said you didn't evaluate
25 any state standards. So I'm confused.

1 A. South Carolina doesn't have any state
2 standards for a game of this type that I'm aware
3 of.

4 Q. Okay.

5 A. When I say standards I'm talking about
6 industry standards or regulatory standards like the
7 regulatory agency that would adopt standards.

8 MR. WHITSETT: Certainly. Your Honor,
9 I certainly don't have an objection towards the
10 admissibility. But I think it's incredibly telling
11 that it is not representative of actual gameplay by
12 actual patrons in this location.

13 THE COURT: Well, I mean -- so
14 you're -- you don't have any objection to the
15 admissibility?

16 You're just arguing -- you're going to
17 make an argument that I shouldn't give it a lot of
18 weight is what you're saying?

19 MR. WHITSETT: Your Honor, I think the
20 fact that it doesn't actually analyze does go to
21 the admissibility.

22 THE COURT: This report?

23 MR. WHITSETT: Yes, Your Honor.

24 THE COURT: Your position after that.

25 MR. McCOY: My position after that,

1 Your Honor, is we have testimony that's here today
2 from Mr. Farley upon his examination of Dragon's
3 Ascent, the game. He has admitted that he has not
4 watched patrons at LG's play it and he hasn't
5 necessarily tested this particular game, but he has
6 tested the game.

7 So we're offering his expert opinion
8 based on those overall tests and not based on what
9 LG's has, the machine that it has and the patrons
10 that are playing it at LG's. So again, this is an
11 overall analysis of Mr. Farley's team and Mr.
12 Farley self-examining the game himself.

13 THE COURT: Well, I guess I should ask.
14 I understand all these are evaluated on a machine-
15 by-machine basis. I understand that a hundred
16 percent, but he did testify earlier that this
17 machine is the same machine that he -- you know,
18 it's not the actual physical machine, but it's the
19 same -- it had no different features than the
20 machines that he analyzed. So at least I thought
21 that's what his testimony was.

22 MR. WHITSETT: But he also admitted
23 that he's never looked at the settings on this
24 particular device and I think that's part of the
25 cheat problem with this is we do have a case by

1 case, machine by machine.

2 THE COURT: I understand. I think that
3 goes more to the weight of the evidence. I'm going
4 to allow the report in.

5 You know, of course I can give it
6 whatever weight I feel necessary if I believe
7 that -- you know, that -- you know, this machine is
8 somewhat different or if I need to consider the
9 position of the state in terms of, you know,
10 whether or not it's a machine-by-machine basis and
11 therefore no -- no expert opinion could ever be
12 offered, you know, as to a particular machine
13 without that machine being the one analyzed.

14 I don't know. I don't know the answer
15 to that without at least thinking about it a little
16 bit and maybe doing a little research. But I'm
17 going to allow it in over the objection.

18 Again, I think it goes more to the
19 weight than the admissibility. So -- but that's
20 Defendant's 3.

21 MR. McCOY: Yes, sir. That's the
22 tab.

23 THE COURT: Excuse me. Yes. Exhibit
24 1, Tab 3.

25 (Defendant's Exhibit Number 1, Tab 3 in

1 evidence.)

2 MR. McCOY: Thank you, Your Honor.

3 THE COURT: All right.

4 MR. McCOY: Judge, if I may have one
5 minute, please.

6 THE WITNESS: Your Honor, may I get
7 some water?

8 THE COURT: Obviously when you're down
9 don't discuss your testimony or anything.

10 MR. McCOY: We have no issues on our
11 side.

12 THE COURT: That's fine. I'll remind
13 the witness you're still under oath and please
14 don't discuss your testimony with anybody else.
15 We'll be in recess for five or ten minutes.
16 Whatever y'all need.

17 (A recess transpired.)

18 MR. McCOY: Your Honor, based on
19 Defendant's Number 1, Tab Number 3 being admitted I
20 don't have any further questions for Mr. Farley at
21 this time. Thank you.

22 THE COURT: Please answer any questions
23 Mr. Whitsett may have. Thank you.

24 THE WITNESS: Your Honor, may I take my
25 mask off?

1 THE COURT: Yes. That's fine,
2 especially when you're testifying.

3 THE WITNESS:

4 THE COURT: If anybody needs to remove
5 them that's fine. I just -- the Chief Justice's
6 mandate still stands as I understand it.

7 EXAMINATION

8 BY MR. WHITSETT:

9 Q. Good morning, Mr. Farley.

10 A. Good morning.

11 Q. You and I have seen each other in court
12 prior to today. Have we not?

13 A. It's been quite some time.

14 Q. Quite some time. The last time was --
15 what -- Sumter or Myrtle Beach?

16 A. Yeah, somewhere down south of Myrtle
17 Beach if I recall correctly.

18 Q. All right. And just out of curiosity,
19 you testified for the defense on both of those
20 prior cases. Did you not?

21 A. I don't recall, but I believe so.

22 Q. All right. You've never testified for
23 me at SLED?

24 I understand you've testified for SLED,
25 but I've never called you as a witness. Correct?

1 A. I don't recall.

2 Q. All right. Just -- on each of those
3 prior occupations occasions you testified that
4 machines were legal but they were found to be not,
5 correct?

6 A. I don't recall the results.

7 Q. You don't recall the results of either
8 of those?

9 A. (Shakes head.)

10 Q. You never learned the results of those?

11 A. No.

12 Q. Okay. Are there any internet cafes in
13 Sumter?

14 A. I have no idea.

15 Q. All right. Let's talk a little bit
16 about the first time I walk up to the machine.

17 A. Sure.

18 Q. All right. I walk up here. And I put
19 money in and I can just play, correct?

20 A. Certainly.

21 Q. Certainly. So I put a dollar in. I
22 can point and shoot and I can either -- play,
23 correct?

24 A. Yes.

25 Q. And certainly you would admit that

1 players do that, correct?

2 A. I would assume so, yes.

3 Q. They'll just put money in and play,
4 right?

5 A. Yes. Uh-huh.

6 Q. And certainly those players stand to
7 win money, correct?

8 A. Certainly.

9 Q. So they start and stand a chance to win
10 something in addition, correct?

11 A. Yes.

12 Q. All right. Let's talk a little bit
13 about that. So this device has a jackpot, correct?

14 A. There is a prize that progresses on the
15 rainbow dragon.

16 Q. So that is a progressive jackpot,
17 correct?

18 A. It's a progressive prize, sir.

19 Q. All right. And so that varies all the
20 time, correct?

21 A. The prize increases with every play of
22 the game --

23 Q. Right.

24 A. -- win or lose.

25 Q. So the maximum amount I can win right

1 now is based on prior plays. Correct?

2 A. The -- well, the -- the -- are we just
3 talking about the progressive jackpot price?

4 Q. Absolutely.

5 A. The prize will continue to increase
6 until such time as the prize is awarded. Once it
7 is awarded it will reset back to a reset value and
8 will continue to progress from there.

9 Q. All right. What did it start at on
10 this device?

11 A. I don't recall.

12 Q. I'm going to show you what's been
13 Plaintiff's 1 or what's been premarked as
14 Plaintiff's 1.

15 MR. McCOY: Your Honor, I have reviewed
16 the photographs. We've got a copy of them right
17 here in front of us.

18 THE COURT: Any objection to these?

19 MR. McCOY: Excuse me.

20 THE COURT: Any objection to them?

21 MR. McCOY: As long as he lays the
22 proper foundation for them, Judge, we don't have an
23 objection.

24 THE COURT: I just didn't know if you
25 were making --

1 MR. McCOY: No, sir.

2 BY MR. WHITSETT:

3 Q. Does this photograph in front of you
4 fairly and accurately represent the functionality
5 that we just spoke of?

6 A. The photo in front of me is a picture
7 of the rainbow dragon with a progressive prize
8 value of \$614.89.

9 Q. Is there any reason to dispute that
10 this photo came from this device?

11 A. I have no reason to dispute that.

12 MR. WHITSETT: Okay. I can certainly
13 lay that down, but I would move to admit --

14 THE COURT: Any objection?

15 MR. McCOY: No objection, Your Honor.

16 THE COURT: Defendant's -- excuse me.
17 Plaintiff's Exhibit 1 without objection.

18 (Plaintiff's Exhibit Number 1 in
19 evidence.)

20 BY MR. WHITSETT:

21 Q. And I'm going to show you what's been
22 premarked as Plaintiff's Exhibit 2. Do you
23 recognize that? Is that the same functionality on
24 this device?

25 A. That is a picture of the rainbow dragon

1 with a progressive price of \$1,555.41.

2 Q. Sure. And what is it today in court if
3 you can see?

4 A. It just went by. I -- I believe I saw
5 its progressive prize was at \$1,783.

6 Q. All right. So if I played Day 1 at
7 Photo 1, Day 2 at Photo 2 and today I stand a
8 chance to win more money today than I did Day 1.
9 Correct?

10 A. Assuming that that's the order of those
11 photos, yes.

12 Q. Sure. And on Day 2 I stood a chance to
13 win more money than I did on Day 1, correct?

14 A. Correct.

15 Q. And if I'm -- if I play the same I
16 stand a chance to win more money based entirely on
17 factors beyond my control, correct?

18 A. No. That's not correct.

19 Q. So if I play identical -- Day 1, Day 2,
20 Day 3 -- I can win more money on Day 3 with this
21 function shooting this, correct?

22 A. The rainbow dragon price value is more
23 than it was on Day 1 and Day 2. That is correct,
24 but it still takes, you know, an accurate show
25 shot, a price -- a color match shot and the right

1 quantity of shots to deplete the health of the
2 rainbow dragon to win that prize.

3 Q. So I'm a first-time player. I put
4 money in to play like you testified that I do.

5 A. Sure.

6 Q. How many shots? How many -- how many
7 shots do I have to capture it?

8 A. The quantity of shots that it takes to
9 deplete the health of a dragon is variable, not
10 based on software and based on player controls.

11 Q. So it varies, correct?

12 A. It does vary. It's based upon what's
13 called the defining shot. The defining shot is the
14 first hit on a creature and how close the color
15 match is to that creature.

16 If it is the same color then it's a
17 hundred percent match and that defines the value of
18 the prize. That determines how many shots it will
19 take to complete the health of that dragon and
20 capture that dragon.

21 Q. So how many shots would it take on
22 Day 1?

23 A. I don't know. I don't have that
24 answer. I don't have that formula readily
25 available. I know that the color of the numbers

1 of the prize indicates the percentage of the
2 overall prize that will be awarded which then
3 determines how many -- how many direct color match
4 shots it would take to win the prize and the color
5 match is important because if you don't exactly
6 match the color you don't get the full strength of
7 a shot.

8 You get -- you may only get a partial
9 strength of a shot which means it will take more
10 shots to complete the health of the dragon and
11 capture it.

12 Q. So how many shots on Day 2?

13 A. I don't know that answer.

14 Q. How many shots today?

15 A. I'm not certain.

16 Q. So I'm the same player, Day 1. I put
17 my money in. I start to play. At a point I hit a
18 dragon. What happens?

19 A. Depending on the dragon you hit you --
20 you have depleted that dragon's health or you may
21 win a prize. There are several dragons on the
22 field that are one-shot wins. So if you hit a
23 dragon with one shot you will win a prize of at
24 least 104 percent of -- of possible play.

25 Q. So it depends on the board, correct?

1 A. I'm sorry. What do you mean by board?

2 Q. It depends -- what's available to me
3 depends on what board I see, correct?

4 A. I'm not sure what you mean by board.

5 Q. The screen.

6 A. The screen. So what's on the screen.
7 But the screen is constantly changing.

8 Q. Sure.

9 A. So you can patiently wait to see what
10 you want and then shoot at what you want.

11 Q. I'm a first-time player. I can't
12 possibly have seen anything beyond what I first
13 see, correct?

14 A. Well, I don't know. I mean, there's
15 information on -- in this day and age there's
16 information online about these things. So you can
17 see things online.

18 You can go to the help screen and you
19 can see things on the help screen. You may have
20 observed other people playing. There's a lot of
21 factors that go into that when you're a first
22 time-player.

23 Q. Sure, but I see it. I walk up to it.
24 I put a dollar in. I can't possibly know what's
25 coming on the next screen at that point in time.

1 Can I?

2 A. The screen does repeat. So if you had
3 been studying the game prior to putting your money
4 in there you may have observed a pattern of how the
5 creatures are presented.

6 Q. Certainly. Only if I had observed
7 someone else or -- so that would not apply to the
8 player that just walked up to the machine, put a
9 dollar in and started playing. Correct?

10 A. Most likely they would probably not
11 know where the presentation of the creatures are in
12 sequence, but they may be able to figure it out if
13 they wait patiently after --

14 Q. Sure. But most probably they'd have no
15 idea, correct?

16 A. I don't know.

17 Q. Sure. So first-time player. I put my
18 dollar in. It depends on what's available what's
19 even offered at that point in time, correct?

20 A. The screen will change. So at that
21 particular point when you put your dollar in there
22 will be creatures on the screen and those creatures
23 are available to aim and shoot --

24 Q. Sure.

25 A. -- or walk in or whatever you want to

1 do or you can wait and observe and be patient and
2 decide what you want to hit.

3 The player that studies the screen
4 and studies the help screen and gets a better
5 understanding of what creatures have what value
6 will do better than other players that just come up
7 and start shooting and may not pay attention to
8 what color they're shooting.

9 You know, the color match is very
10 important to how much money you will spend to
11 capture a creature.

12 Q. Sure. And, sir, you've never seen
13 anyone actually play this device. Correct?

14 A. That's not true. I observed Mr. Smith
15 play that device this morning.

16 Q. As he was preparing for -- okay.

17 A. Yes.

18 Q. We did establish you never saw any
19 actual patron in this location, correct?

20 A. I have not seen a patron at LG's play
21 that machine.

22 Q. Okay. Now, you spent a lot of time
23 around this -- the gaming machine industry,
24 correct?

25 A. Yes.

1 Q. Sure.

2 A. I'm in my 35th year.

3 Q. And you would certainly agree with me
4 that this is all designed to make money, correct?

5 A. Well, the machine is designed to make
6 money and be entertaining and engage people in an
7 activity. Absolutely, but it is a game of skill.

8 So it is possible to that someone could
9 be upside down on this game for a while, that being
10 the operator. Players can actually win money at
11 this.

12 Q. They stand a chance?

13 A. I wouldn't say they stand a chance, but
14 there is an opportunity to do so. If they play
15 strategically well they can come out with more
16 money than they came in with. That is any player.

17 Q. Let's talk about -- this machine tracks
18 money in and money out. Correct?

19 A. Yes. There's meters to track how much
20 money has been inserted and how much money has been
21 redeemed.

22 Q. Sure. And it does not give change,
23 correct?

24 A. No, it does not. Well, it gives change
25 in the form of a voucher that can be redeemed for

1 cash.

2 Q. Right. But that's not -- it does not
3 give -- are you familiar with what the payout --
4 whether the -- does it pay whole dollars or does
5 it pay increments?

6 A. It will pay down to the penny is my
7 understanding. I mean, we have paid for every
8 penny was that on there when we hit the cash-out
9 button.

10 Q. Okay. Let's talk a little bit about
11 the lock-on function.

12 A. Sure.

13 Q. When I play with the lock-on function
14 there's a wheel at the bottom that spends that
15 shows available dragons, correct?

16 A. When you have a lock-on function there
17 is a way for the player to identify what the next
18 creature that will be locked on will be when it
19 comes off of the screen. There is a turret there
20 that moves. With lock-on features on the turret
21 automatically moves and locks onto the creature and
22 allows the player to fire at that creature.

23 Q. It automatically selects whichever of
24 that type it selects, correct?

25 A. No. It is defined by the player.

1 The player defines what type of feature will be
2 locked on.

3 Q. Type of feature, but the --

4 A. The group --

5 Q. -- machine does the selection, correct?

6 A. The group of creature will be decided
7 based upon the next creature in the group to come
8 on the screen.

9 Q. And the player can't select between
10 similarly situated dragons, correct?

11 A. The joystick can be moved left or right
12 and the player can change dragons that are on the
13 screen that --

14 Q. Dragon types, correct?

15 A. Well, it's always about a group, but it
16 will be a dragon that is on the screen.

17 Q. Right. And if there are three of the
18 same types of dragon on the screen it will just
19 select the first one, right?

20 A. It selects the dragon that is entering
21 the screen to give the player the best opportunity
22 to hit that dragon because it will be the dragon
23 that is on the screen the longest at that time.

24 Q. It does the selection for the player?

25 The player can't select a dragon he or

1 she may have already shooting at, correct?

2 A. Well, if the player is already shooting
3 at a dragon then the lock-out feature is probably
4 turned off.

5 Q. Certainly. I can switch between them.
6 Can't I?

7 A. You can switch between them, but when
8 it's turned off it will not lock on and will
9 actually be turned off on the -- on the screen when
10 that group of creature arrives. Now, the lock-on
11 feature is based upon the group.

12 So the group is always the same value
13 prize as any other creature whether it be the same
14 color or not.

15 Q. Certainly. Let's walk through this.
16 So I'm shooting a dragon and I decide I want to use
17 locked on to continue shooting the same dragon.
18 Right?

19 A. Okay. All right.

20 Q. But another dragon has come on the
21 screen of that same category?

22 A. Right.

23 Q. I cannot choose the same dragon I've
24 been shooting at with the lock-on, correct?

25 Lock-on will automatically pick the

1 next one on the screen. Correct?

2 A. My understanding is that you can use
3 the joystick to move left and right and switch
4 dragons that are on the screen to the dragon you
5 choose to desire to lock onto. When that dragon
6 leaves the screen the next time the dragon in that
7 same group comes on the screen it will lock onto
8 that dragon.

9 MR. WHITSETT: Let me show you -- one
10 second, Your Honor. I'm going to as a group move
11 in 3, 4 and 5.

12 THE COURT: Any objection?

13 MR. McCOY: Judge, give me one second.
14 Judge, we don't have an objection there.

15 THE COURT: 3, 4 and 5 into evidence
16 without objection.

17 (Plaintiff's Exhibit Numbers 3, 4 and 5
18 in evidence.)

19 BY MR. WHITSETT:

20 Q. What is the maximum prize I can win?
21 Let me ask it like this. On two of the three
22 photos there's the progressive jackpot, correct?

23 A. The rainbow dragon is leaving the photo
24 or maybe entering the photo on Exhibit 3 and has a
25 price value of \$1,770.81.

1 Q. All right. So it's only one. I'm
2 sorry. I was looking at the -- it's only on one of
3 the three screens, correct?

4 A. That's what I see, yes.

5 Q. Okay. So --

6 A. There it is.

7 Q. So we've established we can't know how
8 many shots it would take to capture that, correct?

9 A. It could be calculated, but it is
10 not -- it is not a fixed number.

11 Q. And it's not -- that fixed number that
12 doesn't exist is certainly not available to the
13 player at any time, correct?

14 A. It's not a number that's just available
15 to see on the screen, but it can be calculated.
16 Any player that walks up there may not know how
17 many shots may have already hit that dragon and
18 what its health may be. So the value may be
19 slightly less than what the calculated value would
20 be.

21 Q. So the value could be contingent on a
22 prior play as well, correct, and how many shots it
23 could take, correct?

24 A. Well, yeah. The health of a -- the
25 health of a dragon is depleted every time it's hit

1 and that health will not increase until the dragon
2 is captured. So any subsequent shots, whether it's
3 by the same player or different player, will
4 continue to deplete the health of a dragon.

5 Q. So the success of winning the jackpot
6 is contingent on prior players, correct?

7 A. No. If you want to stay there and
8 continue to focus on that rainbow dragon until you
9 won the prize you can do so.

10 Q. How many shots would it take?

11 A. I don't know.

12 Q. Could I do it with ten cents?

13 A. If that's the only target you're
14 focusing on and you're only going to shoot at the
15 rainbow dragon probably not ten cents.

16 Q. Sure. So I'd have to pay more money to
17 even win the match, correct?

18 A. I would venture to guess that that is
19 the case.

20 Q. Sure. And we know that's the case,
21 right?

22 A. I mean, there is -- the other expert
23 that will talk on behalf of the manufacturer can
24 give you more details on the calculations that's
25 used to determine how many shots it would take to

1 deplete the health of a dragon. If you want to get
2 specific about the rainbow dragon he would probably
3 be able to do that in his head.

4 Q. Sure.

5 A. I have not studied that. This was just
6 one of the projects we do in our labs. So we kind
7 of put down the facts about how it works and we
8 never really bothered to do the calculation of --

9 Q. So you as an expert can't do it?

10 A. Well, I couldn't, but it wasn't within
11 the scope of what we were ask to do.

12 Q. As we sit here today you haven't?

13 A. I haven't, no.

14 Q. Right. And we are expecting a South
15 Carolina bar patron to do that while playing?

16 A. If a South Carolina bar patron wishes
17 to find out what it would take to deplete the
18 health of the rainbow dragon they might want to
19 do that, but that is up to them.

20 Q. So in reality they would have to
21 continue putting more money in to do that, correct?

22 A. Not necessarily.

23 Q. You just said I couldn't do it with ten
24 cents, right?

25 A. If it was the very first shot and it

1 was your only shot. But if the health has been
2 depleted to the point where there's only one shot
3 left and you put ten cents in or you only had ten
4 shots left on your meter and you hit it then you
5 might win.

6 Q. Then that would be the luckiest person
7 ever, right?

8 A. I wouldn't say that.

9 Q. Okay. But you just said it was
10 virtually impossible to successfully capture that
11 dragon with the minimum shot and only one. Right?

12 A. If it were a brand new game and that
13 was the first shot on the rainbow dragon I would
14 say that ten cents would not deplete the health to
15 the point of capture.

16 Q. So let's go to that point in time, this
17 static point in time. Even at the first time --
18 the very first time you've ever done this an
19 average player can't know how many shots it will
20 take. Correct?

21 A. I don't know. I don't know if an
22 average player would know that or not.

23 I mean, an average player would
24 probably be -- have sufficient education to do the
25 math that would be required to do that and would

1 probably study the game and become aware of what it
2 takes to do that. So it's possible that an average
3 person might be able to do that.

4 Q. What type of education would be
5 required?

6 A. I would say a high school graduate
7 would be sufficient to have the skills to do the
8 addition --

9 Q. The calculations --

10 A. -- and multiplication to do that.

11 Q. The calculations that you can't do
12 sitting here today?

13 A. I didn't say I couldn't do them. I
14 said I wasn't asked to do them.

15 Q. Okay. If I'm a first-time player and I
16 have not watched the entire cycle of the machine I
17 can't know what's on the next level. Can I?

18 A. I don't understand your question.

19 Q. First-time player. I walked up to the
20 device. It's the first time I've ever seen it. I
21 can't possibly know what's coming next, correct?

22 A. First-time player. You just walked up
23 to the machine. Do you know what's coming next? I
24 can't speak to that. I don't know.

25 I mean, you might be a first-time

1 player, but maybe you studied it online. Maybe
2 you've studied other players playing it. You may
3 have just walked up to it, but maybe you've seen it
4 someplace else. I don't know.

5 Q. All of your testimony is predicated on
6 someone having studied before they actually played,
7 correct?

8 A. No. It's an element of skill that one
9 would be able to improve over time. The more you
10 become familiar with the features and how this game
11 is played the more proficient you'll become at it.
12 You can get that from studying others playing the
13 game or you can get that by playing it yourself.

14 Q. Let's talk about playing it yourself.
15 So if I put in a dollar -- he's already shot. If I
16 shoot that whole dollar I'm not going to capture
17 the rainbow dragon. Am I?

18 A. I wouldn't necessarily say that. I
19 mean, if you -- if you employ the correct strategy
20 and understand where the one-shot dragons are and
21 what they look like it's possible to parlay that
22 dollar into much more than a dollar over time which
23 could potentially give you sufficient funds to
24 continue to hit the rainbow dragon upon occasion
25 and continue to deplete its health until a point at

1 which you capture that.

2 Q. And if I never appreciated that there
3 are rules I'd never know that. Would I?

4 A. Well, that would be our your own
5 decision to not read the rules.

6 Q. Sure. But you've got a South Carolina
7 bar patron and your entire assessment is based on
8 having read and studied, correct?

9 A. Well, the information is available to
10 do that. The help screen is available and the
11 player can engage in reviewing that help screen
12 without even putting any money on it.

13 Q. Sure. Let's go to the crazy scenario
14 that this person has never read the rules.

15 A. Why --

16 Q. They put a dollar in.

17 A. I don't recommend that for anything,
18 whether it's Dragon's Ascent, any other type of
19 game or any -- any type of anything. I mean, you
20 should always read the rules and the help screen.

21 Q. Sure, but let's assume for the sake of
22 argument I don't.

23 A. Sure.

24 Q. I point at a dragon. I shoot it. How
25 many shoots is it going to take?

1 A. It may only take one. You're saying
2 you didn't read the rules and you just walked up
3 there. You have no familiarity with the game.
4 You're going to aim and shoot. It is entirely
5 possible that you could hit a one-shot dragon and
6 win a prize.

7 Q. And it's entirely possible that I may
8 shoot it five times and nothing happens, correct?

9 A. You would be depleting the health of a
10 dragon each time you shot it, but there are dragons
11 out there that take more than one shot to deplete
12 to the point of capture.

13 Q. And more than ten shots, correct?

14 A. Yes.

15 Q. More than 20 shots?

16 A. Yes.

17 Q. What is the most?

18 A. I don't know.

19 Q. You can't figure that one?

20 A. I wasn't asked to.

21 Q. Okay. How long does the entire cycle
22 take?

23 A. About five minutes.

24 Q. Okay. The entire game? Every screen
25 that's available at every time is five minutes?

1 A. Each -- my understanding is -- we call
2 them themes in the lab. I think they -- the
3 manufacturer calls them levels, but each level
4 takes approximately five minutes to display all the
5 creatures.

6 You'll notice -- if you've been
7 observing this game here in the courtroom you'll
8 notice that the creatures all leave the screen and
9 there's a gray cloud that comes across the screen.
10 That's when the theme or the level changes. You'll
11 notice the background change and then the creatures
12 come back on.

13 Q. Sure. How long did it take for the
14 whole thing to go?

15 A. I believe there's four different
16 levels. So probably entirely 20 or maybe 30
17 minutes.

18 Q. Would it surprise you if there were
19 five levels and six versions on this?

20 A. What do you mean by versions?

21 MR. WHITSETT: I beg the Court's
22 indulgence. One second. It may be easiest if
23 you -- could I have him walk over to this?

24 THE COURT: Sure.

25 BY MR. WHITSETT:

1 Q. So you observed Mr. Wood turn the key
2 and settings and update software came on, correct?

3 A. Yes.

4 Q. And it's on Settings Level 1, correct?

5 A. Yes.

6 Q. All right. Settings Level 2.

7 A. Okay.

8 Q. Correct?

9 A. Uh-huh.

10 Q. Three?

11 A. Yep.

12 Q. Four?

13 A. Yep.

14 Q. Five?

15 A. Yep.

16 Q. What are the settings levels?

17 A. I don't recall.

18 Q. Okay. Are there different versions
19 that go A through F?

20 A. The only version that I know of that's
21 on here is the one that I said earlier. I believe
22 it's called DA1 103.05 GEN 12399. I'm doing that
23 from memory.

24 Q. All right. So update to release
25 Version A. What is Version A?

1 A. That's probably related to this version
2 of software I would guess, but I don't think we
3 have anything to insert that would update the
4 software.

5 Q. Okay. So there's a Version B?

6 A. Okay.

7 Q. Is that a yes?

8 A. That's what I see on the screen, yes.

9 Q. Okay. Version C?

10 A. Okay. I see that.

11 Q. Version D?

12 A. I see that.

13 Q. Version E?

14 A. I see that.

15 Q. Version F?

16 A. Not F.

17 Q. A through E. So five versions and five
18 settings. Correct?

19 A. That's what it says, Version A and
20 through E. Yes.

21 Q. All right. By pushing the button the
22 Level 5 speed came up as a number, correct?

23 A. Yes. I see 822353.

24 Q. Okay. And it affords the ability to
25 enter the password and --

1 A. It's not -- it's C. Level 5-C.

2 Q. Excuse me. What is Level 5-C?

3 A. I'm not certain. I'm not certain. I
4 don't want to guess.

5 Q. Okay. Are there different Cs for
6 different versions?

7 A. I do not know.

8 Q. There's also a player station menu.

9 MR. WHITSETT: Judge, it may be easier
10 to come --

11 THE COURT: Yes.

12 THE WITNESS: Now, is this my testimony
13 or is this your witness' testimony? I see --

14 BY MR. WHITSETT:

15 Q. I'm going to ask you a question.

16 A. -- him playing with the screen and I'm
17 not.

18 Q. You saw he turned a key, right?

19 A. I saw him turn a key. I saw him use a
20 joystick. I'm wondering if this is his testimony
21 or my testimony. I want to be careful you're not
22 using me as his mouthpiece.

23 Q. I appreciate that.

24 A. Thank you.

25 Q. I want to ask you questions when we get

1 to certain screens and we're just going to get
2 to those certain screens.

3 A. Certainly.

4 Q. And on the play station menu there is a
5 joystick menu, a bill acceptor menu, a Drax board
6 menu, printer menu, player station recall history,
7 audit menu or player's settings. Correct?

8 A. Yes.

9 Q. I'm just reading those. It's not -- if
10 I go to the player settings menu and select it --
11 let's go back. How do I get back to that? All
12 right. If I select the audit menu --

13 A. Yes.

14 Q. Will you read the categories that
15 appear on the audit menu.

16 A. Okay. Last clear date, cash in, cash
17 out.

18 Q. So this was the cash-in counter that we
19 talked about --

20 A. Uh-huh.

21 Q. -- that all machines that take in money
22 and pay out money have, right?

23 A. Uh-huh. IO hold.

24 Q. What's the IO hold?

25 A. That's how much money is held.

1 Q. Okay.

2 A. It's essentially cash in money.

3 Q. Next one?

4 A. Hold percentage.

5 Q. What is a hold percentage?

6 A. It's the hold percentage of the money
7 that's been held that's been inserted.

8 Q. What is the cash play? Cash 1?

9 A. Cash 1.

10 Q. What is the -- is there a return
11 percentage?

12 A. There is a return percentage.

13 Q. All right. There is a games played,
14 the games one --

15 A. Yes, there is.

16 Q. -- and a win percentage?

17 A. It says: Hit percentage.

18 Q. Hit percentage?

19 A. Yep.

20 Q. All right. And then it also has: Fill
21 remaining? Current fill. Pending fill? Excuse
22 me.

23 A. Yes.

24 Q. Excuse me. What is the current fill
25 versus a pending fill?

1 A. My understanding is that a fill is a
2 licensed to operate the software that pays the --
3 their operators and they only have the ability to
4 use the software for so long. When that period
5 ends the software is no longer enabled and they
6 would have to contact Pace-O-Matic to get a new
7 fill.

8 Q. Okay. So that's as long as someone can
9 play and only as long as Pace gives them, correct?

10 A. Yes.

11 Q. Okay. What is the Drax board menu?

12 A. I'm not certain.

13 MR. WHITSETT: Let's talk about the --
14 pull it back up. I beg the Court's -- let me -- I
15 believe that's all I've got --

16 THE COURT: That's it.

17 MR. WHITSETT: -- at this stage.

18 THE COURT: All right.

19 BY MR. WHITSETT:

20 Q. I appreciate your indulgence. We saw
21 there was five settings and five versions, correct?

22 A. Yes. We did see that.

23 Q. I'm going to show you what's been
24 marked as Plaintiff's 6. In the little green space
25 behind that do you see some words?

1 A. It says: Printing, please wait.

2 Q. Then what is the green bubble behind
3 that?

4 A. I believe it says: Free shots.

5 Q. So this device has the capability for
6 free play, correct?

7 A. No. That is what we call an
8 entertaining display. This device has the
9 capability of taking a prize that was earned by a
10 patron that had not been awarded and presenting it
11 to the player in a form that appears they have free
12 plays.

13 In fact, the shots are just an
14 entertaining way to add up to the prize that the
15 player had previously won by capturing a dragon
16 that hadn't been awarded yet.

17 Q. All right. Walk through that one more
18 time.

19 A. Certainly.

20 Q. So it shows free plays? The player
21 believes free plays but the device is not?

22 A. It says: Free shots. It's an
23 entertaining display for the player to realize an
24 award that they became entitled to by the capturing
25 of a dragon previously. So they would have just

1 captured a dragon, but the prize had not been
2 awarded to them yet. So instead of just adding
3 the --

4 Q. Just stop there really quick. So the
5 player captured a dragon but doesn't win what they
6 expected to win?

7 A. Well, they do win what they expected to
8 win.

9 Q. But just displayed -- said I've
10 captured a dragon and I'm at the point where I
11 think this is worth a certain amount. You're
12 telling me I don't realize that amount right away?

13 A. If you'll let me finish I will continue
14 what I was -- where I was.

15 Q. Please.

16 A. So a player has captured a dragon and
17 they have been entitled to a prize. That prize has
18 not yet been added to their credit meter.

19 The game has the ability to present
20 that prize as free shots. The player then will
21 press the shoot button and hit various targets as
22 they go by and doesn't have to pay attention to a
23 color or anything like that because whatever they
24 hit is going to give them a monetary amount that
25 will ultimately add up to the prize that they

1 became entitled to for the capturing of the dragon
2 previously.

3 Q. So for those shots the player still has
4 no effect?

5 A. The player's skill does have effect.
6 They still have to aim and shoot and the feature
7 will continue until they hit a sufficient quantity
8 of creatures to add up to the prize that they
9 became entitled to.

10 Q. Okay. But from the player's
11 perspective that's just an illusion, correct?

12 A. You could call it that. I mean, I
13 think the term I used was an entertaining display.

14 Q. So how many of these free plays can be
15 awarded?

16 A. My understanding is that they're
17 associated with certain dragons when they're
18 captured.

19 Q. How many?

20 A. I don't know.

21 Q. Which dragons?

22 A. I'm not certain. We observed it a few
23 times yesterday. I don't recall. It was like a
24 blue-colored dragon.

25 Q. Okay. But as you sit here you don't

1 know what it would take to even capture those?

2 A. The other expert that will testify on
3 behalf of Pace-O-Matic can give you those details.

4 Q. Sure. I agree. So we may hear that
5 from some other expert, but as you sit here you
6 don't know?

7 A. I am not certain.

8 Q. Okay.

9 A. I wasn't asked to cover that.

10 Q. What happens when a player is
11 successful at capturing a dragon?

12 A. When a player is successful at
13 capturing the dragon the prize associated with that
14 dragon will be credited to their credit meter.

15 Q. Right. Does it also play a jingle?

16 A. I don't recall.

17 Q. Does the money also appear on the
18 screen and then float across into their --

19 A. Yes, it does.

20 Q. Right. And that certainly entices the
21 player to continue shooting. Correct?

22 A. I don't know what it does to the
23 player. That's up to the player whether they want
24 to continue to play or they want to cash out.

25 Q. So it's your testimony that that

1 functionality has no meaning?

2 A. I didn't say that.

3 Q. You said it wouldn't matter to the
4 player, right? Isn't it designed --

5 A. I said I have no idea what the player
6 is going to do after they won a price. I didn't
7 say it didn't matter.

8 Q. Okay. Let me show you what's been
9 marked as Plaintiff's 7. Do you recognize that?

10 A. It looks like a game screen from
11 Dragon's Ascent.

12 Q. That's what I'm asking. Is this a game
13 screen from Dragon's Ascent?

14 A. Yes, it is.

15 Q. What is the highest target value? Did
16 I win the progressive jackpot?

17 A. I don't see the rainbow dragon in this
18 image.

19 Q. Is there anything a player can do on
20 this screen to win that?

21 A. The player would have to wait for the
22 dragon -- for the rainbow dragon to appear on the
23 screen.

24 Q. So the answer is, no, there's no skill
25 and ability from the player?

1 A. That's absolutely --

2 Q. They can win that prize?

3 A. -- not what I said.

4 Q. On this screen the player has no
5 ability to capture that dragon?

6 A. If the player were to fire the rainbow
7 dragon is not present on this screen. He would --
8 if the player was intended to capture the rainbow
9 dragon they would have to wait for the rainbow
10 dragon to appear.

11 Q. Right. So no skill or ability in the
12 actual play on this particular screen, correct?

13 A. That's not correct.

14 MR. McCOY: Your Honor, I was going to
15 say, that's kind of been asked and answered.

16 THE COURT: I sustain.

17 BY MR. WHITSETT:

18 Q. So how much -- how many shots per
19 dragon do I need to fire on that screen?

20 A. I don't understand your question.

21 Q. How many shots do I need to fire to
22 capture a dragon on this screen?

23 A. I'm not sure certain. You may only
24 need to fire one.

25 Q. So that depends. Right?

1 A. Yes, it does.

2 Q. Mr. Farley, have you had the
3 opportunity to look at the joystick menu on this
4 device?

5 A. I don't recall doing that.

6 Q. You've never seen the joystick menu?

7 A. I personally have not, no.

8 MR. WHITSETT: Beg the Court's
9 indulgence.

10 THE COURT: Certainly.

11 BY MR. WHITSETT:

12 Q. Is it fair to say you only looked at
13 the specific settings that you were asked to look
14 at? Correct?

15 A. No. I was not the only person in my
16 office that reviewed this. So there may have been
17 someone else that looked at the joystick settings.
18 I did not.

19 Q. Okay. Well, let me ask you this.
20 There's no leader board of any type displayed on
21 this, correct?

22 A. Not that I'm aware of.

23 Q. And all of your testimony does not
24 account for having witnessed anyone at this
25 location actually play this machine, correct?

1 A. As I have stated before, I have not
2 seen anyone at LG's by the Creek play this game.

3 Q. And your testimony and your opinion is
4 based on a player having read all the rules and
5 played through trial and error, correct?

6 A. My testimony is based upon our
7 examination of the Dragon's Ascent --

8 Q. Sure.

9 A. -- machine.

10 Q. And, in fact, in your report you said
11 it's integral. Correct?

12 A. I think the word integral was in my
13 report, yes.

14 MR. WHITSETT: Okay. No further
15 questions, Your Honor.

16 THE COURT: Anything further,
17 Mr. McCoy?

18 MR. McCOY: Briefly, Your Honor.

19 EXAMINATION

20 BY MR. McCOY:

21 Q. Mr. Farley, I'm not going to keep you
22 up there any longer than necessary. Your expert
23 opinion is this a game of 100 percent skill or is
24 it a game of chance?

25 A. It's a game of 100 percent skill.

1 MR. McCOY: Thank you, Mr. Farley.

2 THE COURT: Next witness.

3 MR. WHITSETT: Your Honor, we think our
4 first witness may be our only witness now, but we
5 have a rebuttal witness now depending on the
6 testimony offered by SLED.

7 THE COURT: Okay. What do you y'all
8 want to do? Are y'all planning want on wanting to
9 break for lunch or --

10 MR. WHITSETT: We like to break for
11 lunch.

12 THE COURT: It's fine. This might be
13 the perfect time to do it if y'all want to do it,
14 but I don't care. I'm not a lunch eater.

15 MR. WHITSETT: If this would be a
16 natural stopping point that would be fine.

17 THE COURT: Y'all want to break for
18 lunch now and come back at 12:30? Is that what
19 y'all want? 12:30? I don't care. I'm not a lunch
20 eater.

21 MR. WHITSETT: We're ready to go
22 forward.

23 THE COURT: How long is your
24 presentation going to be? An hour or two?

25 MR. WHITSETT: Probably.

1 THE COURT: I'm saying if we went now
2 you're not going to be down before 1:30 probably --
3 chances are -- given Mr. Farley's testimony. I
4 mean, it's a couple hours. So, you know, two and a
5 half hours. I'm not -- you know I'm not holding
6 you to that.

7 What I'm saying is I'd rather not work
8 for 30 minutes to an hour and then break in the
9 middle of somebody's testimony. I'd rather just go
10 ahead now, come back and get all the testimony at
11 one time. Is that fine?

12 MR. WHITSETT: That's a prudent plan at
13 this point.

14 THE COURT: I'll give y'all until
15 12:30. That's an hour and five minutes. I don't
16 know where everybody wants to go or whatever.

17 I know some of you guys can find your
18 way around Goose Creek. I know Mr. Wilkins' from
19 Greenville. He might need some help. I'll see
20 y'all at 12:30.

21 (A lunch recess transpired.)

22 THE COURT: Are y'all ready to proceed?

23 MR. WILKINS: Your Honor, before the
24 lunch break I did indicate to the Court we had one
25 rebuttal witness perhaps. We do, but I would like

1 to introduce into the record formally at this time
2 Defendant's Exhibit 1, Tab 1 pursuant to South
3 Carolina Rules of Evidence 803(8) and 902(4). It's
4 the self-authenticating public record.

5 THE COURT: Any objection?

6 MR. WHITSETT: To the admissibility?
7 No, Your Honor. DC has no bearing in South
8 Carolina. To the admissibility, no.

9 THE COURT: So it's Plaintiff's (sic)
10 Exhibit 1, Tab 1. Right, into evidence without
11 objection.

12 (Defendant's Exhibit Number 1, Tab 1 in
13 evidence.)

14 THE COURT: Thank you. You can call
15 your first witness. Is that it for you guys for
16 now?

17 MR. WHITSETT: We would call Special
18 Agent Ryan Wood.

19 RYAN CURTIS WOOD
20 being first duly sworn, testified as follows:

21 EXAMINATION

22 BY MR. WHITSETT:

23 Q. Special Agent Wood, where are you
24 currently employed with?

25 A. I'm currently employed with the South

1 Carolina Law Enforcement Division better known as
2 SLED. I work in Horry County.

3 Q. And what is your current position?

4 A. I'm assigned to the Vice, Alcohol
5 Enforcement section.

6 Q. What do you do in that regard?

7 A. All things related to and also anything
8 Vice related. I also do illegal gambling
9 investigations.

10 Q. Okay. Does that include gaming
11 machines?

12 A. Yes, it does.

13 Q. And you have done that throughout the
14 state, correct?

15 A. Yes, sir.

16 Q. All right. And what is your particular
17 involvement with the device here today?

18 A. My involvement?

19 Q. Yes.

20 A. Back in October I received a complaint
21 that there was a machine of suspicion inside of a
22 bar called LG's by the Creek. I was tasked with
23 going inside and investigating that machine.

24 Q. All right. What did you do as part of
25 that investigation?

1 A. Well, I went inside in an undercover
2 capacity as a normal patron of the bar. I went
3 inside to observe the machine first and then I
4 eventually played the machine.

5 Q. All right. What was your initial
6 impression upon seeing the machine in this
7 location?

8 A. My initial impression is it was similar
9 to other machines that I've played before in my
10 career, but not exactly this machine. This was the
11 first time that I had seen this particular type of
12 machine.

13 Q. All right. Now, when you first walked
14 in and started playing did you see any rules?

15 A. No, sir.

16 Q. Did you read any rules?

17 A. No, sir.

18 Q. Did you sit down -- what -- what could
19 you tell me when you first sat down and what did
20 you do when you first sat down?

21 A. When I sat down I noticed the machine
22 is a two-player machine. There were two stations
23 where two people could play at the same time. The
24 screen was already on.

25 The machine was already running, I

1 guess. I noticed obviously there's dragons moving
2 across the screen at different speeds and angles
3 and directions. I then noticed that each station
4 has a joystick, a shoot button, a ticket button, a
5 raise your cost button and a lock-on menu button.

6 Q. All right. These dragons that you saw
7 initially, could you tell what they were worth?

8 A. No, sir.

9 Q. Did you have any -- could you tell by
10 sitting there what screen was coming next?

11 A. No, sir.

12 Q. Could you tell how much it took to
13 capture any of the dragons on the screen at that
14 time?

15 A. No.

16 Q. All right. Suffice it to say you
17 walked up. And did you put money in the machine?

18 A. Yes, I did.

19 Q. And you began playing?

20 A. That is correct.

21 Q. Walk us through that with your
22 initial --

23 A. Well, the first thing I did is I took
24 \$20 -- US currency, state funds -- and entered it
25 into the machine, the bill acceptor, into the left

1 side. I think that's Player 1.

2 As soon as I entered the \$20 into the
3 machine a prompt came up on that right in front of
4 my gun and turret in front of my player's station
5 on the screen. It asked if I was 18 or older.

6 I could move the joystick to the left
7 for yes or to the right for no. I might have been
8 vice versa. I don't remember where it was, but I
9 moved it to yes. I hit the shoot button to select
10 yes. Then it accepted my \$20 and then \$20 appeared
11 on the screen right beside my gun. It was a dollar
12 sign and \$20.

13 Q. All right. What did you do next?

14 A. I then cycled through the raise your
15 cost button. I tapped it. I noticed that in the
16 middle of my gun turret -- my turret is on the
17 screen in front of that player station -- there is
18 a value right underneath the cannon or the gun. I
19 noticed the first value was ten cent.

20 I selected that button again and it
21 stayed at 20 cent. I hit the button again and it
22 said 50 cent, then again a dollar, and then again
23 \$2. Then it cycled back to the ten cent.

24 Q. So the player could select the amount
25 to play?

1 A. That was my impression at that moment.
2 I had yet to fire any shots or -- but it was
3 obvious that was some type of wager button.

4 Q. Okay. What did you do next?

5 A. I set it to ten cent first. Then I
6 took the joystick -- moved the joystick around. I
7 noticed the gun moved around with the joystick. I
8 then moved the joystick, hit the shoot button.

9 I shot it. A projectile came out of
10 the gun. I struck a dragon on the screen and
11 nothing happened except for that ten cents was
12 deducted from my total value of \$20. So at that
13 point I was down to \$19.90.

14 Q. So you successfully picked out a
15 dragon, targeted that dragon, hit that dragon and
16 nothing happened?

17 A. That's correct.

18 Q. Okay. Did you know how many shots it
19 would take to capture that dragon?

20 A. No, sir.

21 Q. Did you know what you stood to win at
22 that point in time?

23 A. No, sir.

24 Q. What happened when you successfully
25 destroyed a dragon for the first time?

1 A. I believe the first time I successfully
2 destroyed a dragon a -- like coins appeared on the
3 screen. It was a different audible tone if I
4 remember correctly and those coins. The value of
5 what I had won popped up on the screen.

6 It kind of -- kind of moved across the
7 screen towards my bank or my credit value that was
8 listed on the screen there.

9 Q. So it made you aware that you had won a
10 prize, correct?

11 A. Yes. I believe it was 60 cents was the
12 winning prize maybe on my first shot --

13 Q. Prior to --

14 A. -- that I'd won on.

15 Q. Prior to seeing that amount did you
16 have any idea of what you would actually win?

17 A. No, sir.

18 Q. As you played what dd you notice about
19 the amount that you wagered?

20 A. Well, I noticed that if I was wagering
21 ten cent and selected the small pink dragons going
22 across the screen and was successful destroying it
23 then I would get 60 cents. If I moved my bet to 20
24 cents I would -- for that same dragon I would get a
25 \$1.20.

1 Q. Okay. So the more you played the more
2 you stood to win?

3 A. Correct.

4 Q. Okay.

5 A. The more you wagered the more you stood
6 to win if you were successful destroying that
7 particular dragon.

8 Q. The first time you played were you
9 successful in hitting the targets you aimed at?

10 A. I'm sorry. Repeat the question.

11 Q. The very first time you played were you
12 successful in getting all the targets that you
13 aimed at?

14 A. Not every time, no.

15 Q. Okay.

16 A. I would hit them, but you could win or
17 you may not win.

18 Q. So did successfully hitting dragons
19 result in capturing dragons every time?

20 A. No, sir.

21 Q. At that point could you as the player
22 tell how many shots it would take?

23 A. No, sir.

24 Q. Let's talk about the highest value
25 dragon that you saw at that time. Do you recall

1 what that was?

2 A. I think it's that rainbow dragon that's
3 already been stated today that moved across the
4 screen. When I first noticed it I didn't know it
5 was called the rainbow dragon at that time, but it
6 was a dragon that was multicolored.

7 There was a dollar amount assigned to
8 that dragon. It was obvious it moved across the
9 screen. It was kind of like in the middle of the
10 screen and it represented a dollar amount.

11 Q. Plaintiff's Exhibit 1, is that the
12 dollar amount to the best of your recollection?

13 A. To the best of my recollection, yes. I
14 do remember it was around \$614. So this one states
15 614.69 and that would be the best of my knowledge.

16 MR. WHITSETT: For the record I believe
17 I moved to admit all of those without objection,
18 but if I haven't I was going to submit them as
19 Plaintiff's Exhibit 1 through 7.

20 MR. TAPP: I they think they're in.

21 THE COURT: Number 1 through 7, yes.

22 MR. WHITSETT: Thank you.

23 THE COURT: That's with no objection?

24 MR. McCOY: Without objection.

25 (Plaintiff's Exhibits 1, 2, 3, 4, 5, 6

1 and 7 in evidence.)

2 BY MR. WHITSETT:

3 Q. All right. At that time when you saw
4 that \$614 any idea how many shots it would take to
5 capture that one?

6 A. No. I didn't have any idea how many
7 shots it would take to capture that.

8 Q. How do you capture that one?

9 A. I would assume by shooting it.

10 Q. But we don't know how many shots,
11 correct?

12 A. No.

13 Q. All right. Let's talk about what
14 happened as you -- you took more shots than the
15 ones we've talked about thus far. Correct?

16 A. Yes.

17 Q. Talk about the course of your play that
18 first time.

19 A. WELL, like I said, I've played machines
20 that are similar to this. They pretty much work
21 very similarly. On this particular machine I first
22 played by trying to shoot every dragon that came --
23 I tried every dragon. I noticed once you're doing
24 that then when you are successful and you capture a
25 dragon or destroy a dragon that each dragon had a

1 different value if you won or if you were
2 successful.

3 So I did notice that this dragon has
4 this value and this dragon has this value assigned
5 to it and what that means -- in my career and in my
6 training and experience I would just know that
7 there's multipliers assigned to each type of dragon
8 on the screen.

9 Q. Let's talk about your credit balance as
10 you played through the game. What happened during
11 that first undercover operation?

12 A. I believe I did three -- three
13 different gameplays if you will. I put in \$20 the
14 first time I played it. It fluctuated up and down
15 above \$20. Then it would get below \$20 at times.
16 Eventually I played it down to zero.

17 Q. Did you employ the same skill
18 throughout the course of that play?

19 A. Yes. Aiming and shooting, yes.

20 Q. Okay. And you went up to \$70 but
21 ultimately down to zero?

22 A. Correct.

23 Q. At that point were you able to tell the
24 screen that was coming next?

25 A. No.

1 Q. At that point could it have been
2 possible to memorize the entire sequence on this
3 game?

4 A. To memorize the entire sequence --

5 Q. Right.

6 A. --of each dragon in every -- I would
7 say that's impossible.

8 Q. Because you played for a defined amount
9 of time on your \$20?

10 A. Yes. I don't know. Maybe -- I don't
11 know the exact amount of time, but it probably was
12 around 10 minutes.

13 Q. Okay. Did you ever employ the lock-on
14 button at any point during that play?

15 A. I'm not sure if I did during the first
16 play. After I went to zero the first time I did
17 insert another \$20 bill into the machine and played
18 again and this time I did use -- I know that I used
19 the lock-on button at that time.

20 Q. All right. What happened then?

21 A. When I was -- the lock-on, I've seen
22 that type of feature on other games and eventually
23 that lock-on button -- once you select the lock-on
24 button you then have a new menu of characters or
25 dragons in this case that is going to pop up right

1 beside your gun turret.

2 Now, you can use the joystick to
3 maneuver through those characters. There's -- I
4 don't know how many are on there exactly, but there
5 are pictures of each dragon that's available for
6 the lock-on button.

7 So you might have the large gold
8 dragon, the large purple dragon, the large pink
9 dragon, the blue dragon or the green dragon. Then
10 you have a ruby selection which is a group of
11 dragons and gold bars. Those represent some gold
12 dragons.

13 Q. Okay.

14 A. If you select one of those dragons --
15 so it's my choice as a player to select what dragon
16 that I'd like to shoot at with that lock-on button.

17 Q. Okay.

18 A. So if I chose the large pink dragon
19 let's say then if it is on the screen at that time
20 the gun will automatically lock onto that.

21 Q. What happens if there are two pink
22 dragons on the screen?

23 A. If there are two pink dragons on the
24 screen at the same time and I have selected the
25 pink dragon -- pink dragon on my little menu then

1 the machine itself will lock onto whatever pink
2 dragon it wants to. I did not have control of
3 which pink dragon that I could lock onto.

4 Q. Okay.

5 A. I just -- I was just able to lock onto
6 a pink dragon.

7 Q. A type or a category of dragon?

8 A. I didn't see a category in that. I
9 just saw there was a -- there was a definite
10 picture of that dragon on the menu. That is the
11 dragon that appeared on the screen.

12 As soon as it appeared, once you've
13 selected that, it automatically locks on. Even
14 before you shoot it's locked on.

15 Q. But if there are multiple identical
16 dragons you can't select between them?

17 A. That's correct.

18 Q. Okay. At that time using even that
19 function did it tell you how many shots it would
20 take?

21 A. No.

22 Q. Okay. So you had no idea at that
23 point?

24 A. No. I never had any idea how many
25 shots it took to destroy any type of dragon.

1 Q. Okay. What happened when you played
2 with that function?

3 A. Well, I noticed that obviously it
4 locked on with a little dotted line that lets you
5 know which dragon you're locked onto. When I
6 pressed shoot projectiles go from the gun to that
7 dragon. Anything in between your gun and that
8 particular dragon that you're looked onto, the
9 bullets simply just misses all those.

10 It just takes that element out of the
11 game. You're not going to hit any other dragon but
12 the thing that you're locked onto. I noticed it
13 would successfully hit it each time.

14 Q. It successfully hit the dragon but that
15 did not result in a successful capture?

16 A. Not successful. No captures. I did
17 capture some, but still it just took a number of
18 shots. I don't know how many.

19 Sometimes it would take less.
20 Sometimes it would take more. Sometimes it was
21 somewhere in between. You just never knew how many
22 shots it took.

23 Q. So even from your perspective when you
24 utilized the lock-on it would take a different
25 number of shots for the same dragon?

1 A. Yes. If you were successful in
2 capturing or destroying the dragon with a
3 lock-on menu and you kept it there on that lock-on
4 menu and the next time it came across the screen if
5 I was successful in shooting or capturing it with
6 four shots the first time and I did the same thing
7 the second time and shot four shots it may not die
8 then.

9 It may have died on the third shot time
10 this time or it may have taken 16 shots. There was
11 just no way to know how many shots it took to kill
12 that particular type of dragon.

13 Q. From a player's perspective based on
14 your play of this there was no way to know?

15 A. No way to know.

16 Q. Can two players utilize that function
17 at the same time?

18 A. Yes, sir.

19 Q. Utilizing that function would those
20 players be guaranteed the same result?

21 A. I don't -- would they be -- no. I
22 would say no.

23 Q. Okay.

24 A. I mean, I could be -- if a player is
25 playing beside me where we were both locked onto

1 the pink dragon let's just say I could shoot it --
2 I could hit my button 20 times and shoot it 20
3 times. Player 2 over here could hit it twice.

4 He wins. I don't win. I've played
5 20 -- let's see. If I was betting a dollar I've
6 played \$20. If he was betting a dollar he's played
7 \$2 and he won and I lost.

8 Q. Okay. What happened to the \$20 you put
9 in during that second play when you utilized only
10 lock-on?

11 A. I believe I played that one down to
12 zero as well. I believe it was the third time that
13 I did not play it down to zero.

14 Q. All right. Let's talk about that.

15 A. During my third gameplay I basically
16 used the same type of strategy that I had been
17 using before -- so -- which was going in between
18 the lock-on button and the single-fire mode.

19 My money would fluctuate up and down.
20 I'm still noticing that different dragons are
21 offering different amounts of money when I was
22 successful to capture one. I was never able to
23 figure out how many shots it took to kill any type
24 of dragon, but once I got up to \$30 this time I
25 decided to hit the ticket button.

1 Q. Okay. What happened?

2 A. Well, I know the ticket buttons
3 from -- from my experience and from machines
4 similar to these, the ticket button is usually
5 going to -- I'm going to receive a ticket from the
6 machine once I hit that button and it's usually
7 your game credits. In this case it was a dollar
8 amount where my credits -- they were already in
9 dollar amounts.

10 Sometimes we see those where games can
11 be put in credit value instead of dollar value. In
12 this case it was a dollar amount on the screen. My
13 dollar amount, I believe, was \$20.41.

14 Once I hit the ticket button a prompt
15 came on the screen asking me was -- was I sure if I
16 wanted to cash out for \$20.41. Yes and no was at
17 the bottom again. I then moved it to yes.

18 Q. What --

19 A. Once I hit yes usually a ticket should
20 have popped out of the ticket dispenser. At this
21 time there was a prompt that came on the screen
22 that stated printer malfunction or still printing
23 or something like that. So I didn't know what was
24 going on.

25 Nothing came out of the machine. I

1 then asked a waitress. She was like, I've never
2 seen it -- that happen before. I mean, maybe you
3 should ask the bartender.

4 I then asked the bartender and they
5 were kind of clueless as well. It was at that
6 point a patron of the bar walked up to me and asked
7 what was wrong.

8 I told him what was going on, basically
9 that I had played. I had a \$20 credit and it was
10 visible on the screen. I had pressed the ticket
11 button and nothing happened. He could see that the
12 printer was -- he said, hold on, I know the owner.

13 He made a phone call. He walked away
14 to make his phone call. He came back and stated
15 that the printer was -- owner advised that the
16 printer had been down and that I could come back
17 the next day to receive the -- my winnings.

18 I stated, well, are they going to take
19 my name? He's like, I don't know. Maybe talk to
20 the bartender.

21 Q. Okay. What happened next?

22 A. I then talked to the bartender. She
23 walked over. She looked at the screen. She -- she
24 noticed my value was at \$20.41. She goes, hold on.

25 She went over to -- to behind the bar

1 and walked over to the register. At that time she
2 retrieved money from the area of the register. It
3 was a \$20 bill. She brought it back to me and
4 handed it to me.

5 Q. All right. So you had 20.41, but you
6 were paid \$20. Correct?

7 A. Yes.

8 Q. So there was no change provided?

9 A. No, sir.

10 Q. Okay. So what did you do next?

11 A. I then asked her what she wanted me to
12 do with the credits on the screen because they're
13 still there due to the fact that I was unable to
14 get the ticket and cash out. So those credits are
15 still available on the screen for anybody to play
16 with. They were available for me to play with
17 again.

18 So I asked her what she wanted me to
19 do. Do you want me to purposefully and quickly
20 just bet high and lose all this? She said, sure.
21 So what I did was I moved the joystick all the way
22 to the left where my gun was pointed to the bottom
23 screen corner as far as it would go. I raised my
24 bet up to a dollar or -- I don't know if I went to
25 a dollar or two dollars. It was obviously one of

1 those.

2 I started hitting the shoot button just
3 to get rid of the money real quick. It was going
4 down. Then I noticed all of a sudden I won money
5 from shooting something off the screen.

6 So the bullets would go off the screen.
7 Something -- it was hitting some dragon and I was
8 getting awarded money. So I actually made money
9 when I was trying to lose on purpose. Then
10 eventually I was able to lose all the money back
11 to zero.

12 Q. Okay. Based on that initial play what
13 contributed to your -- the outcome of your play?

14 A. What contributed to the outcome of my
15 play?

16 Q. Yes.

17 A. Is that --

18 Q. Yes.

19 A. I feel like it was, you know, totally
20 random and based on what the machine itself wanted
21 to do at any particular time during the game. I
22 employed the same strategies as I played, shot at
23 the same dragons on purpose the same amount of
24 times because -- and different -- I got different
25 results each time.

1 So nothing was uniform. So to me
2 the -- there was -- any strategy or skill that
3 might have tried to employ was eliminated by the
4 computer itself which is ultimately the brain of
5 the game. It was controlling the outcome. I
6 wasn't able to control the outcome.

7 Q. All right. Did you have an occasion to
8 go back in a second time undercover at this
9 location?

10 A. Yes, I did.

11 Q. All right. When you played the second
12 time were you more skillful than the first time?

13 A. I wouldn't say skillful at all. I
14 would say I -- now, after you play the game you're
15 obviously going to see different dragons and you're
16 going to -- and if you play it long enough you're
17 going to see the different boards. So you will see
18 that. But as for the way I played I played the
19 exact same way.

20 Q. All right. And what happened?

21 A. It's basically the same results.
22 Fluctuation in winnings and losing, nothing based
23 on the way I was playing. I -- if I won I would
24 try to do the exact same thing the next time and I
25 wouldn't win.

1 So to me if you're calling my skill
2 now, me playing, and I wasn't -- and if I used that
3 same skill to do it right over again and it didn't
4 happen the same way then I would say that skill has
5 been eliminated by the machine and not me.

6 Q. All right. Let's talk about the
7 progressive jackpot. At that point do you recall
8 what the total amount of the jackpot was the second
9 time?

10 A. I did notice it was higher. I want to
11 say it was in the \$700 range and this was maybe a
12 week later.

13 Q. Okay. So the total amount of the
14 jackpot was more the second time you played?

15 A. Yes. It definitely had increased. I
16 would say it increased by maybe \$100 or so.

17 Q. All right. At that point did you have
18 the occasion to play with any other players?

19 A. That day -- yeah, it was funny. The
20 same guy that came up to me and told me that he
21 would make a phone call based on the printer, he
22 was there again that night. He came up and just
23 started chatting with me about the game.

24 He watched me play for a while and then
25 he ended up playing beside me. I think he won. He

1 ended up winning. He put some money in. I think
2 he put a \$20 bill in. He played a little while and
3 ended up winning over \$100.

4 Q. Okay. So you witnessed him put \$20 in
5 and walk away with \$120?

6 A. Right, and then I witnessed him walk to
7 the bar and at which time the bartender paid him
8 his -- an amount of money. I wasn't -- I couldn't
9 see all the bills and everything. So I wasn't able
10 to count it, but he was given several bills from --
11 from the bartender just like I was that previous
12 time when I got paid out.

13 Q. Let me ask you this. When you started
14 playing the second time did you see any rules?

15 A. No. He actually came back over and
16 told me, hey, you can read the -- there's -- if you
17 move the joystick up -- up or down and hit the
18 shoot button or the cost button -- one of the
19 buttons and the joystick at the same time will
20 bring up a -- a instruction manual.

21 Q. So you never saw that, but somebody
22 else told you about it?

23 A. Right, and at that point I did it.
24 I pulled it up.

25 Q. All right. Were you able to -- what

1 did you do at that point?

2 A. I read it. I went through it. I
3 noticed that they were talking about color
4 matching, groups of dragons, the vials. I noticed
5 that.

6 Q. All right. What happened during your
7 play subsequently?

8 A. I tried the -- I tried to focus on the
9 color matching after that point which is -- the
10 color matching to me is the wheel. The gun turret
11 has a color wheel that spins around. It kind of
12 goes around where it says your wager amount.
13 That -- that is constantly spinning and it ranges
14 from yellow to blue, pink.

15 Whatever colors that are available,
16 those colors are on that turret wheel. That is
17 constantly spinning the whole time. So you try to
18 line up that -- that color and then shoot when it's
19 green at the end when it's -- if I want to shoot a
20 green -- the green color and I'm going to try to
21 color that match that with a green dragon then you
22 would try to shoot with the green color at the
23 green dragon.

24 Q. What happened during that play?

25 A. I was able to color match, hit dragons.

1 Nothing happened. I was able to color match, hit
2 dragons and sometimes they were destroyed --

3 Q. All right.

4 A. But I didn't see any difference from
5 the way I was playing to the way the color match
6 played. I was still -- it was still random as if I
7 was going to -- how many times it took to kill a
8 certain dragon and the values were different.

9 The money values were different when
10 you actually did capture. It could be \$6.50 I win.
11 I killed the same dragon the next time and it's \$7.
12 All that's telling me is there's different
13 multipliers assigned to that dragon. If there is a
14 range then it is falling into that range --

15 Q. All right. Did you have the --

16 A. -- and -- I'm sorry.

17 Q. No. Please.

18 A. No. Go ahead.

19 Q. The third time you went -- so you
20 played three times undercover, correct?

21 A. Yes.

22 Q. Let's talk about the third time you
23 went in.

24 A. All right.

25 Q. Was there anyone else playing at that

1 time?

2 A. When we first walked in there was
3 a young male -- when I say young, probably late
4 20s -- playing.

5 Q. All right. What happened?

6 A. Well, I watched him play. He played
7 his amount of money. He didn't win and played it
8 to zero and walked away.

9 Q. Okay. Did you have the occasion to
10 play after that?

11 A. I did.

12 Q. Did watching that individual play make
13 you any better?

14 A. No.

15 Q. Okay. Just walk through your play
16 during the third time.

17 A. The third time I tried to go through
18 each scenario again. I mean, I'm there to play the
19 game and to -- and to really look at it. So I did
20 the single-shot mode whereas you're aiming and
21 shooting. I did the lock-on mode again. I then
22 set the gun, aimed just at the middle of the screen
23 and turned my head and shot --

24 Q. All right.

25 A. -- with my eyes closed basically.

1 Q. What happened then?

2 A. I won in every scenario. I lost in
3 every scenario. Nothing, I mean, definitive. I
4 employed the same strategies just like I had done
5 before. If I was able to shoot a particular color
6 dragon I would look for that same dragon again,
7 employ the same strategy and get different
8 outcomes. So...

9 Q. Okay. What was the total amount
10 available for win at that point?

11 A. On the progressive jackpot?

12 Q. Yes.

13 A. I think it was up to 1,500 at that
14 point if I remember correctly.

15 Q. Okay. That's represented on
16 Plaintiff's Exhibit 2.

17 A. \$1,555.41.

18 Q. So during the course you played on
19 three times the first time the maximum amount you
20 could have won was 600. The second time it was a
21 little over 700 and the third time it was 15
22 hundred?

23 A. Right, and I did notice while I'm
24 playing I did pay attention to that value and
25 notice that it was increasing while I played. Then

1 it was obvious that each time that the shoot button
2 is basically pressed and money is then entered into
3 the game basically a credit value has gone into
4 that game at that time every time the shoot button
5 is pressed some amount of money is added to that
6 jackpot.

7 Q. Okay. Ultimately after that third
8 occasion you did seize this machine, correct?

9 A. Yes, I did.

10 Q. All right. Since that time have you
11 continued playing on this device?

12 A. Yes.

13 Q. Let's talk about that. Walk us through
14 that.

15 A. What exactly would you like to know?

16 Q. Let's talk about you're the course of
17 your play over --

18 A. I used -- at that point I wanted to
19 use all the strategies and see if I got a different
20 outcome by using this strategy versus this
21 strategy. So I did the single-shot mode. It's not
22 a care in the world of color matching at all. Just
23 shooting, aiming at something and shooting it.
24 Every type of dragon was on the screen.

25 I then used that same single-shot mode

1 and I would pick out a certain dragon, shoot it
2 until I destroyed it. I would take -- I would note
3 how many times it might take. It took five times
4 to shoot the green dragon.

5 I would then do that again. That same
6 dragon would come back on the screen. I would
7 shoot again. It might take 10 times or might take
8 15 times before I was able to destroy it again.

9 Q. Okay.

10 A. I then played with trying to do the
11 color match. I would shoot dragons successfully
12 color matched. A value would pop up.

13 From what I read in the instruction
14 manual the color match is nothing more than you're
15 supposed to get the highest multiplier if you're
16 successful by using the color match. You can still
17 play this game and be successful in it and win
18 money and win more money than what you put into
19 this game by not using color match. But their
20 claim is that if you use color match you stand to
21 make more money.

22 Q. Okay.

23 A. At that point it's a claim. It's words
24 on a screen. It's an instruction manual that pops
25 up. Is it proven? I don't know.

1 But I -- I played -- the way the
2 instruction manual played. I saw the value amounts
3 differ. When I color matched, to me I should have
4 got the highest multiplier since that's what it
5 states I would get. But I would get 650 like I
6 said. Then maybe I would get 750. Both times I
7 color matched.

8 Q. Okay.

9 A. According to the manual if you color
10 match you should get the highest multiplier.

11 Q. Did you successfully shoot a dragon
12 with one shot?

13 A. Yes.

14 Q. Okay. Did you immediately shoot the
15 thing -- one again?

16 A. Yes.

17 Q. What happened with your second shot?

18 A. It did not destroy it that time.

19 Q. Have you ever had a dragon speed up
20 after you hit it?

21 A. Yes.

22 Q. Describe that.

23 A. Well, you would shoot at a dragon. I
24 successfully hit it with my bullet or projectile
25 and then the dragon would actually speed up as it

1 moved across the screen. It's nothing more than
2 that.

3 It just -- it changed speeds once I hit
4 it successfully. Now, that's not capturing.
5 That's just making a successful hit on the target.

6 Q. How long in total would you say that
7 you played on this device?

8 A. I probably played 30 minutes each
9 during each undercover operation. There was three
10 of those. Then an hour and -- I would say at least
11 eight hours.

12 Q. Okay. Is it fair to say that you have
13 employed similar skill throughout your play?

14 A. Yes.

15 Q. Did you get the same results on
16 employing that similar skill?

17 A. No. I couldn't -- you would think
18 after the longer that I play the claim is that you
19 get better. Well, if I'm better then I should
20 always win more than what I did the first time I
21 played and that's not the fact. I could win more
22 the first time I played than the last time I
23 played. I mean, I don't -- there's just no getting
24 better. You might recognize that this dragon's
25 worth more.

1 Does that make you better because you
2 know that dragon's worth more? No. It doesn't
3 make you better.

4 Q. As you sit here today can you tell us
5 how many shots it will take to capture every dragon
6 on the screen?

7 A. As I sit here today do I know how many
8 shots it takes to capture each dragon? No. I
9 don't know how many shots it takes to capture any
10 dragon.

11 Q. As you sit here today do you know
12 what's coming on the next board every single time?

13 A. I don't.

14 Q. During the course of your play,
15 particularly in the undercover capacity, you put
16 money in the machine, wager different amounts and
17 sometimes walked away with more money. Correct?

18 A. Correct.

19 Q. And you witnessed others winning money?

20 A. Correct.

21 Q. Did they win every single time?

22 A. No.

23 Q. And you've seen individuals lose money?

24 A. Yes.

25 Q. As you sit here today, having read the

1 rules, can you successfully play every time on this
2 device?

3 A. No. This -- this game is pretty simple
4 to me. I could put in whatever amount of money I
5 want to put in and I have the chance to win more
6 money than that. That's gambling to me.

7 If I can put in a dollar and I'm able
8 to win \$20 that's gambling. I'm also able to lose
9 that. So you're able to lose or you might win.

10 You're gambling your money and that
11 is -- to me that's the point of this game. If
12 there was no chance of winning money at this game I
13 don't see any entertainment value for bar patrons.
14 I see there's games all over bars that don't offer
15 payouts and they're not getting paid.

16 When I go in a bar and a game is
17 getting played like this and they're winning
18 money but they're playing it because they're --
19 it's a gambling. Gambling is -- well, it's
20 addiction, right? So that's been proven that
21 people have addictions to gambling, but that's what
22 makes it fun.

23 Q. All right. I'm going to show you
24 what's been marked as Plaintiff's 12. Do you
25 recognize that as it relates to your testimony

1 today?

2 A. Yes, sir.

3 Q. All right. Were you able to access
4 this menu on the device?

5 A. Yes. The keys that were provided to me
6 the day that I had seized the machine -- I -- I'm
7 not sure if -- I know he's an attorney associated
8 to the machine and the company that owns the
9 machine. He provided me with the keys.

10 I used them earlier today in the
11 demonstration. I think it's the red or the green
12 key. You can turn and then you're able to access a
13 menu. The joystick menu is one of the selections
14 that you can choose.

15 Q. All right. Let's just walk through the
16 instructions on what this -- does this photograph
17 fairly and accurately represent what comes up when
18 you hit that?

19 A. Yes, sir.

20 MR. WHITSETT: All right. I would move
21 to admit Plaintiff's 12.

22 THE COURT: Any objection?

23 MR. McCOY: None to this.

24 THE COURT: Plaintiff's 12 into
25 evidence without objection.

1 (Plaintiff's Exhibit Number 12 in
2 evidence.)

3 BY MR. WHITSETT:

4 Q. Read the instructions.

5 A. The instructions listed on the picture?

6 Q. Yes.

7 A. Says: By holding the shoot or spacebar
8 move left or right to adjust the dead zone.

9 Q. All right. What's the next
10 instruction?

11 A. Pressed raised shock cost button or the
12 I key to invert axes.

13 Q. Okay. I'll show you what's also been
14 marked previously as Plaintiff's 8 and 9. Do you
15 recognize those as they relate to your testimony
16 today?

17 A. Yes, sir.

18 Q. Are those each different screens
19 available on this device?

20 A. Yes.

21 Q. All right. How many -- looking through
22 all the photographs up there how many different
23 game screens are there?

24 A. Sorry. I apologize.

25 Q. That's okay.

1 A. I've seen six different ones I think
2 right now. Maybe seven. I'm not certain, but
3 there's at least seven that I see that I think are
4 different.

5 Q. Aside from the progressive jackpot
6 number that appears on those are the values of any
7 of the dragons visible to the player on those
8 screens?

9 A. No. The only dragon that appeared that
10 has a value that a player can see how much that
11 particular dragon is worth is the progressive
12 jackpot rainbow dragon.

13 Q. All right. And that increased over
14 time, correct?

15 A. That increases every time that the game
16 is played whether you win or you lose by any player
17 playing the game.

18 Q. On each of those individual screens
19 having played this game can you tell us what each
20 is worth.

21 A. I'm sorry. Can you repeat --

22 Q. Having played those on each screen can
23 you tell us what each is worth?

24 A. I'm sorry. I'm sorry again. That --

25 Q. On each of those screens we see a

1 number of dragons, correct?

2 A. Yes.

3 Q. Can you tell us how much many shots it
4 would take to capture each dragon --

5 A. No. I don't know how many shots it
6 takes to capture any dragon on any screen --

7 Q. -- or what the value would be with the
8 except of the jackpot?

9 A. No. I know -- the only thing that I
10 know is based on what I wager those values with
11 change.

12 Q. Those values increase?

13 A. Right. The more you bet then the more
14 you win if you're successful in shooting a
15 particular dragon.

16 MR. WHITSETT: I beg the Court's
17 indulgence one second.

18 (PLAINTIFF'S EXHIBIT 13, Color
19 Photograph, was marked for identification.)

20 BY MR. WHITSETT:

21 Q. I'll show you what's been marked as
22 Plaintiff's 13. Is that what is representative of
23 what the device looked like in the location itself?

24 A. Yes. That's the machine in the
25 location.

1 MR. WHITSETT: No further questions,
2 Your Honor.

3 THE COURT: All right. Any cross?

4 MR. McCOY: Judge, are you ready for
5 cross?

6 THE COURT: Yes, sir.

7 MR. McCOY: Okay. Thank you.

8 EXAMINATION

9 BY MR. WILKINS:

10 Q. Good afternoon, Agent Wood.

11 A. How are you doing, sir?

12 Q. Any degree of skill involved in this
13 game?

14 A. I think skill is a broad term when it
15 comes to games like this, but to me the skill that
16 you need to play this game I think every person
17 possesses already. What I mean by that is I can
18 move a joystick left or right.

19 I have the ability to touch a button
20 and press it. I have an ability to touch another
21 button and read what my bet may be and change that
22 bet. I have the ability to change the way my gun
23 shoots with a lock-on menu. Then just aiming -- if
24 you want to say aiming is a skill or moving a
25 joystick, then sure.

1 Q. As a SLED agent I assume you take
2 periodic training on the range shooting weapons?

3 A. That's correct.

4 Q. When you shoot a weapon is aim
5 important?

6 A. Aim is important, yes.

7 Q. In fact, if you shoot with great skill
8 you'll hit the target every time?

9 A. That's correct.

10 Q. And if you can shoot with great skill
11 with this machine you can hit that dragon you aim
12 at every time?

13 A. Yes.

14 Q. Is that correct?

15 A. Yes.

16 Q. So we'd have to say that aiming is a
17 skill and aiming is part of playing this machine?

18 A. Yes, but if I aim on this machine --
19 if I aim on this machine and shoot the target
20 successfully I do not destroy it every time.

21 Q. That's right. You don't destroy the
22 target? You just hit the target?

23 A. That's correct.

24 Q. Some dragons you can capture with one
25 shot. Is that true?

1 A. That is true.

2 Q. Some shots -- some dragons it takes six
3 shots to capture? You have to hit it six times?

4 A. That's possible. It may take more. It
5 could take less.

6 Q. That's right. So some dragons, six
7 shots will capture the dragons. Other dragons, one
8 shot will capture the dragon. Correct?

9 A. That's correct.

10 Q. And you determine the value of each
11 shot? You, the player.

12 It could be a ten-cent shot or a dollar
13 shot, but you decide how much you're going to value
14 your shot?

15 A. Yes. I can wager whatever amount of
16 money I want -- well -- given ten cents, 20 cents,
17 a dollar or two dollars.

18 Q. But you can -- before you aim you can
19 determine the value of that shot?

20 A. Yes.

21 Q. The machine doesn't determine that?
22 You determine that?

23 A. That's right. I'm placing my bet at
24 that point.

25 Q. So there's no chance involved as to the

1 value of that shot that you select to shoot at the
2 dragon?

3 A. That's correct. It's just like a slot
4 machine. I choose -- on a slot machine I would
5 choose the value that I bet on a slot machine just
6 like I do on this machine.

7 Q. And the greater the value of the shoot
8 the less shots it takes to capture the dragon?

9 A. Say that again.

10 Q. The value -- the greater the value of
11 the shots the less shots it takes to capture a
12 dragon?

13 A. No, sir.

14 Q. That's not correct?

15 A. I said, no, sir. That's correct.

16 Q. Okay. Well, let me ask you this. If
17 an individual -- by the way, when you walked in to
18 play that machine did you look at the help menu?

19 A. No. I did not see the help menu. I'm
20 sorry.

21 Q. You could have seen it if you wanted
22 to.

23 A. I did not see it. That's all I can
24 tell you.

25 Q. But now knowing the fact you've had the

1 machine in your possession for weeks now you know
2 the help machine is displayed are there on the --
3 on the screen? If you want to see it you just --

4 A. I noticed that there's a tiny lettering
5 about yay big in the corner that says help and I
6 did not see it when I first sat down because -- I
7 just didn't see it.

8 Q. Have you since seen it?

9 A. I have since seen that, but there is
10 no -- the prompt or the menu is not on the screen.
11 You have to activate that for the menu to come up
12 on the screen.

13 Q. You activate it before you play?

14 You don't have to play to see the help
15 menu? You can --

16 A. That's correct.

17 Q. -- look at it and see that for free?

18 A. That's correct.

19 Q. You can stand there and look at how the
20 game is played before you put your first dollar in?

21 A. You could.

22 Q. If you -- if -- by the way, you say
23 this is a game of chance even though aiming is
24 based upon -- successful aiming is based upon your
25 ability to aim correctly, a skill that you develop.

1 So what --

2 A. You can aim, but you can also use the
3 lock-on button. That takes aiming out of it at
4 that point.

5 Q. A good point you make. Stand by it.
6 The lock-on button, how is that collected by the
7 player? Is it random?

8 A. No. I can press it, press a button.

9 Q. Well, you --

10 A. I can press a button to move to the
11 lock-on.

12 Q. And once you move to the lock-on if you
13 do the other things you're supposed to do with
14 eye-hand coordination, timing and those things then
15 you will capture or at least hit that dragon? The
16 one you locked onto.

17 A. Can you repeat that.

18 Q. If you lock onto a dragon then you make
19 that decision to lock on or not lock on, correct?

20 A. That's correct.

21 Q. And if you do all the things you're
22 supposed to do skillfully you will automatically
23 hit that dragon that you're locked onto? You won't
24 miss it? That's what I'm saying. You will hit
25 that dragon because it's locked into your gun?

1 A. If you call hitting a lock-on button
2 skill, then yes.

3 Q. By my question --

4 A. That's all I have to do to do to lock
5 on.

6 Q. Excuse me. Go ahead.

7 A. That's all I have to do to lock on was
8 hit the button and I don't even have to select any
9 dragons on the menu at that point. The menu
10 appears -- okay -- and as soon as those dragons
11 that are on the menu appear on the screen they
12 highlight on the menu there.

13 Okay. They get brighter. That's
14 letting the player no, hey, that dragon is on the
15 screen right now. If I don't move that joystick
16 whatever it's already selected on will
17 automatically lock on.

18 I do nothing to lock onto the dragon
19 except hit that button. Ow, if I want to change
20 the dragon that it locks on then I move the
21 joystick left or right and choose which dragon I
22 want at that the point.

23 Q. Well, let me ask. Why would a player
24 ever lock onto a dragon?

25 A. Why?

1 Q. What's the advantage of doing that?

2 A. Well, it eliminates the aiming part
3 that you say is skill. You've eliminated that
4 angle of the game at that point. There is no more
5 aiming because you're not going to worry about
6 hitting anything that's in the way of your
7 designated target.

8 Q. Are there any other skills involved in
9 playing this machine other than aiming truly?

10 A. I don't know what you call skill.
11 That's what I'm saying. I think -- I mean, what
12 are you -- do you have a specific example?

13 Q. Well, let's say you're skeet shooting
14 and the skeet goes out. What skill is involved in
15 shooting that skeet? Aiming? What else?

16 A. Aiming.

17 Q. What else?

18 A. I don't know. What else is there?

19 Q. Timing. Would you let the skeet just
20 fly away or do you have to shoot it within a
21 limited period of time?

22 A. Well, yeah. Sure. Timing.

23 Q. If you shoot within a limited period of
24 time allowed and your aim and is true your skill
25 will accomplish your desired goal of hitting that

1 skeet?

2 A. I assume so in skeet shooting, yes.

3 Q. Well, how much time do you have to
4 shoot one of these dragons when it appears on the
5 screen?

6 A. I have no idea the exact time.
7 Seconds.

8 Q. Would you assume he flies in less than
9 three seconds?

10 A. Less than three seconds?

11 Q. Yes, some of the dragons. Not
12 necessarily every dragon, but --

13 A. I don't know how -- I don't know how
14 much time it takes for each dragon to move across
15 the screen.

16 Q. Well, let's assume it takes about three
17 seconds for a dragon to appear on this side of the
18 screen, go across the screen and you have to aim
19 and shoot in three seconds. Are you able to do
20 that?

21 A. I've never said you don't have to aim
22 to shoot -- shoot at a particular dragon if you're
23 using the single-shot mode, but you can bypass that
24 aiming altogether by using the lock-on mode.

25 Q. And you aim at the dragon and you shoot

1 that dragon within that three-second interval?

2 A. Yes.

3 Q. And you were successful in hitting the
4 dragon?

5 A. I hit it, but nothing happens. Nothing
6 is awarded to me.

7 Q. Let me ask a question. Can you hit the
8 dragon?

9 A. If I aim? Is that what you're saying?

10 Q. No. If you aim true and you do it
11 within the time allotted -- just a few matter of a
12 few seconds -- and you hit the dragon would you say
13 that's based on skill or chance?

14 A. That's based on me aiming and hitting
15 the shoot button at the right time.

16 Q. And is that skill or chance?

17 A. I don't call that skill because I don't
18 think there's much skill involved.

19 Q. How can you say that's not a skill?

20 A. Sir?

21 Q. Is it chance? It's got to be one of
22 the two, chance or skill. Pick one.

23 A. You could say it's more skill than
24 chance.

25 Q. Oh, okay.

1 A. Yes.

2 Q. So there is some skill involved in this
3 game?

4 A. Skill, but like I said I think it's
5 skill that the average person has already. I can't
6 get better. You either aim and -- you just aim.
7 You aim the gun and you shoot.

8 I'm not getting better at that. I
9 mean, you can only get so to do good at that.
10 That's it -- right -- in my opinion. That's my
11 opinion.

12 Q. Do you think if you'd taken the time to
13 read the help menu and you had watched the dragon
14 machine being played by others --

15 A. Uh-huh.

16 Q. -- and then you had began to play it
17 do you think your success rate -- successful play
18 would increase over time?

19 A. No.

20 Q. Are you a golfer?

21 A. Yes, I am.

22 Q. Did you get better over time?

23 A. This is nothing like golf.

24 Q. Well, I didn't ask you that. I'm
25 asking about your skill as a golfer. Did you get

1 better over time?

2 A. Of course.

3 Q. And how did you get better? Practice?

4 A. Practice.

5 Q. Experience?

6 A. Practice. Yeah.

7 Q. All right.

8 A. Like I said, it's nothing like golf.

9 Please, those two aren't comparable to me. I've
10 been playing golf all my life and I can assure you
11 these are two different animals.

12 Q. Is playing golf a game of skill in your
13 opinion?

14 A. Yes.

15 Q. Tennis?

16 A. Yes.

17 Q. Chess?

18 A. I look at this as -- I walked to this
19 machine and I can move a joystick left or right.
20 That takes minimal effort. I can hit a button.

21 I used the joystick to aim. Right. If
22 I go to a basketball court I think everybody could
23 move a joystick and hit a button. I also think if
24 you hand somebody a ball and tell them to shoot at
25 the basket they can all do it -- right -- but in

1 basketball a person who knows how to shoot is going
2 to shoot it better.

3 With this I can't move a joystick but
4 so many ways. Everybody can move it the same way.
5 You can't be more skillful in moving a joystick
6 than someone else because you can only move it so
7 many ways. I can't hit the button any differently
8 than somebody else can hit the button.

9 Q. Let me give you a hypothetical. Let's
10 assume that a player studies the menu and studies
11 the pattern of the dragon -- by the way, do you
12 know these dragons repeat? We see them more than
13 once coming through the screen.

14 A. I see --

15 Q. Is it the same dragon?

16 A. I see the same type of dragon, but I
17 can't tell you if that's the same dragon that I saw
18 ten minutes ago. Is that the same exact same
19 dragon because --

20 Q. Well --

21 A. You were asking this question. Let --
22 these dragons do take a number of shots to kill
23 them right and that is done and that is set by the
24 person who made this game. That is -- that would
25 have to be in the code. I'm not into computers.

1 I'm not going to pretend that I know
2 how to code a game, but that's where it's all built
3 into. Okay. They can formulate how many times it
4 takes to shoot that dragon if that answers your
5 question.

6 Q. Did you learn from your experience
7 with this machine and from reading the help menu
8 and instructions that these dragons appear on a
9 repeating pattern identical to the last time that
10 dragon appeared over a period over a period of
11 about 32 minutes?

12 A. I didn't --

13 Q. The same dragon. If you study that
14 pattern enough you would know when a certain dragon
15 or at least one that you know the image of is
16 coming up --

17 A. You know when --

18 Q. -- on the screen?

19 A. You could, I guess, in a laboratory
20 setting figure that out. Absolutely.

21 Q. Why would you have to be in the
22 laboratory? Why don't you just watch the machine
23 and use your brain and memorize the patterns?

24 A. That's not going to help you play the
25 game. Just because I know what's coming doesn't

1 help me.

2 I mean, shooting and destroying the
3 dragons is how you play the game and that is --
4 that's how you get success in the game. That's
5 what makes you win. Me knowing that a pink
6 dragon's going to show up in ten minutes doesn't
7 help me.

8 Q. Well, it may not help you, Agent Wood,
9 but let me suggest it might help me if I'm trying
10 to win money and I know that when a certain dragon
11 comes across that screen that I've got enough money
12 that I selected to put into my shot that dragon's
13 going to be worth a whole lot more than a lot of
14 other dragons that are flying through there.

15 So I'm saving my shots for that dragon
16 that's got more value to it and I know it's coming
17 because I've memorized the pattern. Do you think
18 that's a skill or is that just somehow a memory of
19 chance somehow?

20 A. The pink dragon may come across the
21 screen numerous times in different levels, but it's
22 the same -- is that the same pink dragon? If it is
23 why do you have to wait ten minutes? Why don't you
24 shoot it when it shows up on the screen at that
25 point?

1 There's nothing saying you have to wait
2 for the pattern to come back because it's the same
3 dragons -- right -- that are moving across the
4 screen. They're just moving across the different
5 background.

6 Q. You can wait as long as you want as a
7 matter of fact, can't you?

8 A. You could, but why wait? If you're say
9 you're waiting for a particular dragon that dragon
10 is probably already on the screen. It will come
11 back on this board, but it might come back in
12 between there, too. So...

13 Q. That's right. That dragon will repeat
14 itself in the same pattern every time.

15 A. Okay.

16 Q. Is that a true statement?

17 A. I don't know. I didn't make the game.

18 Q. But you could know it if you studied
19 the game long enough.

20 A. I wouldn't know. I would say the only
21 person who truly knows that is the person that made
22 the game.

23 Q. If I observe an individual who has good
24 eye-hand coordination, timing, has read the help
25 menu, has practiced on the range and is a dead-eye

1 shot who comes in and plays that game 16 times and
2 cashes out at the end of each game 16 times and
3 wins money every time -- not 50 percent of the
4 time as flipping a coin might do -- but every
5 single time that player is successfully --
6 successfully played that machine would that lead
7 you to any conclusions about skill or chance with
8 regard to that machine?

9 A. Are you winning the exact same amount
10 every time?

11 Q. No, but I just win every time. But
12 this is a hypothetical. The expert does. Would
13 that mean that's a game of chance? If you had to
14 pick chance or skill which one is it? Where will
15 you go?

16 A. I could probably win most times that I
17 play and then choose to stop. When you're winning
18 you can choose to stop at any point. So any -- I
19 think you could do that if you chose to stop.

20 Now, are you saying they went in and
21 each spent a hundred dollars and each hit the shoot
22 button and vetted the same amount and they each hit
23 the shoot button the same amount of time with their
24 exact same amount of money that they placed in the
25 machine and hit the same exact targets each time

1 playing the same strategy? Maybe.

2 Q. What is the purpose of playing that
3 machine do you think? The average guy in a
4 restaurant or bar, why would he play that machine?
5 Entertainment? What else?

6 A. Gambling.

7 Q. To make money?

8 A. Yes, and that illegal in South
9 Carolina.

10 Q. So would you define successful play as
11 making money? That is you put in \$20 dollars and
12 you get back \$20.50?

13 A. If I put in \$20 and make more than
14 \$20 then --

15 Q. Then you successfully won the machine?
16 I mean, you won money?

17 A. You successfully won money. Yes.

18 Q. It is. And you think you can play that
19 machine 16 times and win 16 out of 16 times?

20 A. I never said that.

21 Q. No. I said, do you think you could?

22 A. I don't know. There's a lot of
23 variables. You're just saying, can I play it.
24 Like I said, if you really want to look at it you'd
25 have to put the same amount of money in 16 times.

1 You'd have to play the exact same way
2 each time. If you're going to say what you said
3 everything has to be the same and I win this same
4 exact amount of money then I'd say something --
5 that would be closer to I think what you're getting
6 at. Okay.

7 Q. No. I'm --

8 A. If you put in -- if a player puts in
9 \$20 and he plays -- just plays and he -- and he
10 puts in a hundred dollars the next time and he just
11 plays, well, you're -- the whole thing changed when
12 you put in a different amount of money.

13 Are you betting the same amount? I
14 don't know. You didn't say. You just asked if you
15 played 16 times in a row and you won each time --

16 Q. Right.

17 A. -- if that would that be a success.

18 Q. That's what I asked you. I'm asking
19 you. Would that lead one to the conclusion that
20 this game is --

21 A. No.

22 Q. -- based upon skill and not chance?

23 A. I would say no.

24 Q. Okay. That's fine.

25 A. I would say that's complete chance.

1 Q. You mentioned the fact that one of the
2 reasons it's not skill by the hypothetical is
3 because you can stop the machine -- the play
4 whenever you want to and cash out. Is that
5 correct?

6 A. I didn't say that had anything to do
7 with skill. I just said that you can stop at any
8 time.

9 Q. Oh. I --

10 A. If you put a dollar in and you're up to
11 two dollars and you want to cash out just to say
12 you won, then yeah.

13 Q. As I said, can you stop your play
14 whenever you want to?

15 A. You can stop whenever you want.

16 Q. And does that play into skill or
17 chance?

18 A. Neither. I just stopped playing.

19 Q. Who decides if you stopped playing?

20 A. I do.

21 Q. The machine or --

22 A. Well, I didn't need any skill to
23 stop playing.

24 Q. You had to decide to stop playing,
25 didn't you?

1 A. I had to decide to walk in that door.
2 It didn't take any skill to get in here to me, did
3 it? I mean, where are you at on skill?

4 I think everybody possesses the same
5 skill when it comes to making decisions on whether
6 I'm going to stop playing or I am going to begin
7 playing. That isn't a skill.

8 I don't get better at stopping or
9 starting the game. So how is that a game if I
10 can't get better than that, right?

11 Q. Are you familiar with this memorandum
12 submitted by SLED through your lawyers?

13 A. I'm not too familiar.

14 Q. You didn't talk to your lawyers about
15 the play with all the --

16 A. I talked to -- the memorandum that
17 you're speaking about, I don't know.

18 Q. Well, let me ask you just a couple of
19 questions and I'll be done. Let me ask you if you
20 agree with this statement. Which dragon, how many
21 shoots it will take and what this player stands to
22 win remains completely random.

23 A. Repeat it again, please.

24 Q. You want me to read it again?

25 A. Yes, sir.

1 Q. Which dragon, how many shots it will
2 take, and what the player stands to win remain
3 completely random.

4 A. Do I agree with that? Yes. In my
5 opinion I agree with that, yes.

6 Q. You agree with that. Agent Wood,
7 are you willing to stake your professional
8 reputation on your assertion that this is a true
9 statement? Want me to read it again?

10 A. Sure.

11 Q. Okay. I can let you read it if you
12 like.

13 A. I would, yes.

14 Q. It's right there next to the bottom of
15 the page.

16 A. Okay. To me, yes. I agree with that
17 statement in my opinion.

18 Q. You're stake your professional
19 reputation on the fact that you agree that this is
20 a correct statement?

21 A. Yes.

22 Q. It's true and correct?

23 A. I agree with the statement. Yes, sir.

24 Q. We've had some talk about a free shot.
25 I think it was referred to by SLED as a free play.

1 There are no free plays on this game, are there?

2 A. When I played the game and when I
3 assumed got a free play when the free shots came up
4 and I was shooting and nothing was being deducted
5 from my point -- my credit value.

6 Q. Just tell us. What is a free shot on
7 this game?

8 A. It would be when that prompt came up
9 that stated I had free shots and I was shooting.
10 Nothing was being deducted, but I was shooting
11 dragons and destroying dragons.

12 Q. Did you win anything or hit anything on
13 the free shots?

14 A. Yes.

15 Q. Okay. You hit some dragons on your
16 free shot. Did you win any credits from making
17 those hits?

18 A. I believe I did.

19 Q. Are you sure about that?

20 A. I'm not sure. I'm not completely sure
21 but.

22 Q. Indeed the free shot -- all that did
23 was just allow you to see on the machine what you
24 had already won? True or false.

25 A. I don't recall that. That was -- the

1 first I've heard of that was today. Free shots, I
2 saw free shots on the screen when I did play. At
3 that moment I focused on my credit value and my
4 gun. Okay.

5 I wanted to see if anything was being
6 deducted. To me if nothing is deducted when I hit
7 the shoot button then I was getting a free shot.
8 That's what I was occurring. I was not having any
9 credits being deducted from my total credit value
10 when I selected the shoot button during the free
11 shot mode.

12 Q. I'll read you one more sentence and ask
13 if you agree with this.

14 A. Okay.

15 Q. It says: From the player's perspective
16 this machine ultimately dictates the outcome of
17 every possible play and the results are completely
18 random. True or false?

19 A. Do I agree that the machine controls?
20 Is that what you're saying?

21 Q. Do you agree with this statement.

22 A. Can you read it again? Can I read
23 it myself?

24 Q. It's the first sentence in the second
25 paragraph.

1 A. I do better when I read it myself.

2 Q. Okay.

3 A. First sentence?

4 Q. Second paragraph. I think the first
5 couple of words is just lead-in words, but --

6 A. Yes, sir. I agree with that.

7 Q. So the record is clear, from the
8 player's perspective this machine ultimately
9 dictates the outcome of every play and the results
10 are completely random. Do you agree with that?

11 A. I agree.

12 Q. A player's skill and ability thus is
13 subservient to the machine? True or false.

14 A. Subservient?

15 Q. Yes.

16 A. Meaning? I don't know the meaning of
17 that word.

18 Q. Oh. Subordinate. Controlled by. A
19 player's skill and ability is controlled by the
20 machine?

21 A. I believe it takes control and
22 eliminates me skill and the strategy. I didn't
23 say that it controls my -- well, it does in a way,
24 I guess, with the lock on. That controls my
25 aiming. So I guess it can.

1 MR. WILKINS: Thank you, Agent Wood.

2 THE WITNESS: Yes, sir.

3 THE COURT: Any more cross?

4 MR. WHITSETT: Nothing further, Your
5 Honor.

6 THE COURT: All right. You can have a
7 seat.

8 THE WITNESS: Yes, sir.

9 THE COURT: Any further witnesses?

10 MR. WHITSETT: No, Your Honor.

11 THE COURT: All right. Rebuttal.

12 MR. WILKINS: I call to the stand
13 Mr. Brock Smith.

14 BROCKIE LEON SMITH

15 being first duly sworn, testified as follows:

16 EXAMINATION

17 BY MR. WILKINS:

18 Q. Brock, how old are you sir?

19 A. I'm 49 years old, sir.

20 Q. And are you familiar with computers?

21 A. I am.

22 Q. When did you first become familiar
23 with computers?

24 A. I started messing around with computers
25 back when I was around six or seven years old.

1 Q. And would you say your computer
2 knowledge was gained through your personal
3 experience and self-study?

4 A. Yes, sir. That would be correct.

5 Q. And did you -- do you understand today
6 how computers operate?

7 A. I know them quite well.

8 Q. Do you understand how data processing
9 works --

10 A. Yes, sir.

11 Q. -- and how to write programs for
12 computers?

13 A. Yes, sir.

14 Q. Have you been involved in the -- in
15 using computers in your work now?

16 A. Every day.

17 Q. And how many days has that been or
18 years has it been that you have been involved in
19 using computers?

20 A. For what I do right now currently, well
21 over 20 years.

22 Q. During that 20 years have you ever
23 designed any video games?

24 A. Most of my life in those 20 years, yes,
25 sir.

1 Q. And do you presently work for the
2 manufacturer of Dragon's Ascent?

3 A. I do.

4 Q. Tell us about Dragon's Ascent. How did
5 it come into being?

6 A. So one day the owner of the company
7 came to me. He had an idea. He wanted to be able
8 to build a game of 100 percent chance -- I mean --
9 I'm sorry -- 100 percent skill -- no chance
10 involved -- for us being able to move a game to
11 multiple markets.

12 Q. By multiple markets you mean different
13 states?

14 A. Yes, sir.

15 Q. And so he tasked you with this
16 responsibility?

17 A. Yes, sir.

18 Q. Did he give you any help? Did you have
19 anybody working for you?

20 A. Yes, sir.

21 Q. How many people?

22 A. A staff of over 20.

23 Q. And over a period of time did you
24 design, build and cease the manufacturing of
25 Dragon's Ascent?

1 A. I did.

2 Q. How many years did it take you to
3 develop that machine?

4 A. That machine has been in development a
5 little over five years now.

6 Q. Over five years?

7 A. Yes, sir.

8 Q. Now, prior to that machine --

9 MR. WILKINS: I'm going to offer this
10 testimony of the witness as an expert witness, Your
11 Honor, in the field of computer design and the
12 manufacture and design of these machines.

13 THE COURT: Okay. Any objection?

14 MR. WHITSETT: No objection, Your
15 Honor.

16 THE COURT: Okay. So ordered.

17 BY MR. WILKINS:

18 Q. Now, tell us about the designing and
19 building of this machine. I mean, it just didn't
20 come into being all of a sudden.

21 A. No, sir.

22 Q. How does it work? What do you do to
23 build something like this?

24 A. One of the things is first things is to
25 come up with a decent concept. You try to sit down

1 and do the story board. You try to come up with
2 things are going to be, images on the screen, what
3 you think players might like to play, how they
4 interact with it.

5 Then you have to come up with math
6 models and how it's going to work, what -- what
7 objects are needed. You've got to bring in
8 graphics and create that. All graphics have to
9 have, you know, in a game engine colliders and all
10 these different things that help assemble a game
11 together to do this.

12 Q. And when you design this game do you
13 test it to see if it works?

14 A. Almost every day.

15 Q. How many times did you test this
16 machine before you put it on the market?

17 A. Oh, millions of plays. This thing
18 gets played every day. During development there's
19 always something else. I mean, the first design is
20 not always the desirable one.

21 Q. And have you -- is this machine in
22 operation in other places besides South Carolina?

23 A. It is.

24 Q. Is the District of Columbia one of
25 those places?

1 A. It would be.

2 Q. Where else?

3 A. Kansas, Texas, a handful in New York.
4 They have been in Nebraska. They have been in
5 Florida.

6 Q. And in your experience with this
7 machine -- let's take Texas for example. I know
8 you're familiar with the operation there.

9 Do people play this machine and make
10 money on a continuous basis?

11 A. They do.

12 Q. How do they do it?

13 A. By learning the rules of the game is
14 the biggest part. Most people will sit and study
15 the instruction manual. They come up with
16 strategies, how to play this thing and they
17 practice a lot.

18 Q. All right. I read this statement to
19 the witness who just testified. Agent Wood. A
20 player's skill and ability is subservient to the
21 machine. Do you agree with that?

22 A. That's absolutely false.

23 Q. I'm sorry?

24 A. That's absolutely false.

25 Q. False. And why is that false?

1 A. Because the machine never thwarts the
2 efforts of a player to win more than he can
3 actually play for.

4 Q. Why not?

5 A. The player understands that they have
6 several things at their beckoning that they can
7 use, tools that we've created in the game where
8 they can sit and beat this game every single play.

9 Q. And when you say beat this game that
10 means win money --

11 A. Yes, sir.

12 Q. -- at the end of the game?

13 A. Yes, sir.

14 Q. Let me ask you this. Would do you
15 agree with this statement? From a player's
16 perspective the machine ultimately dictates the
17 outcome of every play and the results of the play
18 at random.

19 A. That's absolutely false.

20 Q. And why is that false?

21 A. Well, the Number 1 reason is there's no
22 random number generator in this that has anything
23 to do with it. A player's outcome, a player's
24 skill, is dependent upon the player.

25 Q. I'm going to ask you to walk through

1 how it's played, but let me just ask you. What is
2 a free shot? If this machine says you get a free
3 shot what does that mean?

4 A. So a free shot is what we would call a
5 bonus. Most video games are some type of power-up
6 players like. It's exciting for them to get.
7 Technically it's just another reward, a reward that
8 you've already earned, where on this it's just an
9 entertaining view that reveals to the player their
10 reward they've already gotten.

11 It just hasn't been shown to them yet.
12 So basically it's a pause in the game. You're
13 still in your current last game. You shot a
14 dragon. You won the reward.

15 The reward now need to be displayed to
16 you. It's a fun way for the player to be able to
17 see what they've already won.

18 Q. And so if it says free shot do you have
19 to take a shot with your -- with your shot button?

20 A. Yes. So you do take a shot, but it --
21 as has been stated, it doesn't cost you anything.
22 It also doesn't technically win you anything. What
23 it does is starts displaying through lights and
24 different things going on on the screen.

25 There are three different functions on

1 that game, three different bonuses, that all do the
2 exact same thing. They just display it a different
3 way.

4 Q. So the free shot perhaps is incorrectly
5 labeled as free shooting. It is free. It doesn't
6 cost you anything, but you can't win anything with
7 it. Right?

8 A. That's correct. You've already --
9 you're just playing it out until it displays what
10 you've already been rewarded.

11 Q. We heard some discussion about the
12 lock-on mechanism. Tell us about how the lock-on
13 mechanism works on this machine.

14 A. So lock-on is an extension of your
15 skill and strategy. If you're playing and
16 you're -- you see a shot come up, your shot -- a
17 shot power or shot value that you really want to
18 use in your game if that dragon that comes on the
19 screen is not somewhere close to you and you want
20 to be sure you use that correctly if you take your
21 time, use the lock-on, get to the right one, select
22 the right dragon, time your shot correctly and hit
23 that dragon at the right time then you can take
24 advantage of that. If you weren't able to lock on
25 you would not be able to do that half the time. As

1 you can see on the screen there are multiple
2 dragons on there constantly.

3 Q. Does it take any skill to lock onto a
4 particular dragon that you have selected?

5 A. It does.

6 Q. What is involved in doing that?

7 A. You have to recognize what dragon you
8 want to get to and which target you actually want
9 to aim at. That's the most basic part of it.

10 Secondly, why are you wanting to aim at
11 that? A skilled player will look at their shot
12 power and will say, hey, I've a shot here I need to
13 use. I want to hit that dragon. Therefore it's
14 easy to lock on.

15 If you grab a hold of it you lock on.
16 You slick through. You get there quick. I find
17 the one I need. You time your shot correctly.
18 Therefore when the bullet hits it you get the most
19 value out of that shot.

20 Q. One final question I want to ask you or
21 final statement. Tell me if you believe this is
22 true or false. Which dragons, how many shots it
23 will take and what the player stands to -- stand a
24 chance to win remain completely random. True or
25 false?

1 A. False.

2 Q. Why is that?

3 A. One again, there's nothing random about
4 this game. There's no random element in here.
5 There's no random number generator. You can't have
6 random without that.

7 Q. All right. Mr. Smith, how about
8 walking us through so I can understand it and
9 everyone here can understand how this game is
10 really made. I understand that there's all kinds
11 of computer things involved, but I want to walk up
12 to this game and I want to play it.

13 What do I need to know to play it
14 successfully?

15 A. Well, the first thing is I look on the
16 screen and see where the help menu is. Open it up
17 and start studying this manual. This manual tells
18 you every single thing you need to know on how to
19 beat this game.

20 There are very simple instructions we
21 put together on every feature in the game. Page 1
22 of the help on there will tell you how to play,
23 your color match and why that's important. Page 2
24 of that will show you your --

25 Q. I'm sorry. Go ahead.

1 A. All right. Page 2 will show you your
2 defining shot, what that is and why it's important,
3 what it actual he does. It also goes on to tell
4 you about your shot power.

5 Those vials besides your turret are
6 very important information for the skill player.
7 That information is also continued on Page 3 of the
8 instruction. Then it goes to tell you about
9 lock-ons, what it's used for and why it's there.
10 Continuing on Page 3 it tells you about your
11 dragons.

12 The very first thing it tells you about
13 are your one-shot captures. The chrome dragon, for
14 instance, or the sapphire dragon, those are
15 one-shot kills no matter what your shot --

16 MR. WILKINS: For the record, Your
17 Honor, he's reading from the help menu that's found
18 at Tab 3.

19 THE COURT: Yes, sir.

20 BY MR. WILKINS:

21 Q. All right, sir. Now, let's just talk
22 about playing the machine and --

23 THE COURT: That's already into
24 evidence.

25 MR. WILKINS: I'm sorry?

1 THE COURT: That's already into
2 evidence.

3 MR. WILKINS: Yes, sir.

4 MR. WHITSETT: That's Tab 3 of the
5 report?

6 MR. TAPP: That's in.

7 BY MR. WILKINS:

8 Q. Walk us through, Mr. Smith. Teach us
9 how to play the machine. Help me understand it.

10 I'm going to read the help menu so I
11 can study that and understand all the information
12 that I can understand or glean from it.

13 A. Absolutely.

14 Q. Then I'm going to look at the machine
15 and watch the dragon patterns.

16 A. That's right.

17 Q. Do the dragon patterns repeat?

18 A. They do. It's every time. So on the
19 game myself every what we call level -- every level
20 of the game last five minutes. It's approximately
21 right at five minutes. The opening of that scene
22 is kind of a fun, entertaining viewpoint. Most of
23 it you'll see are just crazy patterns. They're
24 just cool to look at. Then there's a main scene
25 that happens right after that. That part of it

1 last about 30 seconds. The main scene last roughly
2 270 seconds.

3 Q. In any event, the pattern of the
4 dragons repeat across the screen. So if I'm
5 sitting there -- by the way, when I'm getting ready
6 to play the game are any time limits placed on the
7 player?

8 A. There's not. You can put in money.
9 You don't have to. You can sit there. There's no
10 time limit to force me to play anything.

11 Q. If I have sufficient time and memory
12 can I memorize the patterns that will repeat --

13 A. You can.

14 Q. -- over and over again?

15 A. Absolutely.

16 Q. All right. Then what happens? How do
17 it play it? Do I put in a dollar or \$20? What do
18 I do?

19 A. That depends on the player, what you
20 really want to play. You have multiple shot costs.
21 So whatever you decide you want to play at, you can
22 put in an amount of money that might be sufficient
23 for that.

24 Q. I put in \$20 and then I have to
25 decision to make as to how much value I'm going to

1 place on each shot. Is that correct?

2 A. That's correct.

3 Q. Can I put a value of ten cents on a
4 shot?

5 A. You can.

6 Q. Can I put a value of \$10 on a shot?

7 A. No.

8 Q. I mean one dollar on a shot.

9 A. Yes, you can.

10 Q. Why wouldn't I always use ten cents?
11 That's cheaper than a dollar.

12 A. Because it might not be to your
13 advantage at that time to do so.

14 Q. Why?

15 A. There are many times when a game lasts
16 \$2 because if I go to my one-shot kill dragons I
17 know it's an extra four percent extra beyond my
18 shot cost to win back. If I shoot at \$2 I win
19 \$2.08 every time it cause comes up with one shot.

20 Q. Did you make that decision or the
21 machine it?

22 A. No. I made the decision.

23 Q. All right. So you put your money in
24 and then you're going to figure out how many --
25 what value you're going to put each time you pull

1 the trigger?

2 A. That's correct.

3 Q. So then what happens?

4 A. Then I look through my shot power vials
5 and I go through the shot costs to be able to tell
6 which one of those might be the most advantageous
7 to play.

8 Q. Shot power vials?

9 A. Yes, sir.

10 Q. What are those?

11 A. Through the left of the turret a
12 virtual liquid fills the vials. It tells you how
13 full they are. You can determine exactly how
14 powerful each shot is going to be before you take
15 it.

16 Q. All right. And is there some kind of
17 color coordination that's involved in successfully
18 playing this machine?

19 A. There is. The color match of the --
20 the color match is the primary goal of the game.
21 If I take -- every shot I take, every dragon on
22 there is a color. To maximize every shot power no
23 matter what it is, I want to be able to match the
24 color of that dragon as high as possible. If the
25 color of the dragon is red, for instance, I want to

1 be sure that when my bullet gets to that dragon
2 that it's red when it hits it.

3 Q. What other colors could it be?

4 A. It could be orange, could be yellow,
5 could be green, could be cyan, could be blue, could
6 be purple, could be pink.

7 Q. How many colors are there?

8 A. There's eight colors.

9 Q. And you want to maximize your winnings
10 and one of the ways you do it if I'm correct is I
11 match the color with the dragon?

12 A. That's correct.

13 Q. With my shot hitting the dragon
14 hopefully if I'm skillful and my timing is right
15 and my eye coordination is right it will be the
16 same?

17 A. That's right.

18 Q. And if they're the same I win more than
19 if they were not?

20 A. That's correct.

21 Q. Who the determines when to pull that
22 trigger?

23 A. I did as the player.

24 Q. What went through your mind when you
25 pulled the trigger? What things did you think

1 about?

2 A. Aiming it.

3 Q. Aiming it.

4 A. Determining how far away the dragon is
5 from me that I want to hit, ensuring that the color
6 on the rotation dial is doing to be where I need it
7 to be so that I can be sure it's actually the color
8 I want it to be by the time it hits that dragon
9 over that distance.

10 Q. Was this Dragon's Ascent machine
11 turret -- gun -- will it hit whatever it aims at
12 every time?

13 A. Every single time.

14 Q. If your aim is true do you hit what you
15 intend to hit?

16 A. As long as you time your shot
17 correctly.

18 Q. Tell me about timing the shot
19 correctly. What does that mean?

20 A. So if I have perfect aim on a spot and
21 a dragon is passing by and I know I'm going to
22 shoot this if I don't time that shot right -- if I
23 don't leave that dragon right on that shot then
24 obviously it's not going to hit that dragon. It's
25 going to hit in front of him or behind him as he's

1 passing by.

2 Q. So it means the dragon will move off
3 the screen?

4 A. That's correct.

5 Q. During that approximately three seconds
6 it's moving across?

7 A. Yes, sir.

8 Q. And if you miss the dragon because your
9 timing is off and the dragon escapes the screen so
10 to speak --

11 A. Yes, sir.

12 Q. -- will that bullet then hit the side
13 and ricochet around and hit something unintended?

14 A. It will not.

15 Q. Not ever?

16 A. Not ever.

17 Q. Let me ask you, Mr. Smith. Prior to
18 this machine being brought to LG's restaurant --

19 A. Yes, sir.

20 Q. -- did you play it?

21 A. I did.

22 Q. Why did you play it?

23 A. Because you asked me to.

24 Q. Why did I ask you to?

25 A. You asked me to play it 16 consecutive

1 times to come out with a -- with a winning outcome
2 every time to show that it could be done.

3 Q. Was this a day or two before it was
4 delivered to South Carolina --

5 A. Yes, sir.

6 Q. -- at the LG's restaurant?

7 A. Yes, sir.

8 Q. How many times did you play it?

9 A. 16 consecutive times.

10 Q. How many times did you play it
11 successfully?

12 A. I cashed out 16 winning tickets in a
13 row.

14 Q. Go to Tab 5. Tell us what you see here
15 on Tab 5, Mr. Smith.

16 A. Those are game tickets. These are the
17 ones that I cashed out of that machine before it
18 went to the field when I was playing it.

19 Q. Help me understand it. Ticket Number
20 1.

21 A. So Ticket Number 1, you look for the
22 ticket I did and it will show you which one that
23 is, 0000, whatever one. I put in \$20. I played
24 the game and I ended up cashing out \$20.20.

25 Q. How about Ticket Number 2?

1 A. Ticket Number 2 once again I inserted
2 \$20 in the machine. I played it. I cashed out
3 \$22.

4 Q. I'm sure the Court and opposing counsel
5 agrees with me. We won't go through every one of
6 them, but just flip over and let's look at Number
7 10, for example.

8 A. Yes, sir. Number 10, I put in \$20 and
9 once again cashed out \$22.

10 Q. How about Number 15?

11 A. I played Number 15. I put in \$40 and I
12 cashed out \$40.08.

13 Q. And the last one is 16.

14 A. With 16 I put in \$40 I cashed out \$83.

15 Q. Why did you pick 16?

16 A. I'm sorry?

17 Q. Why did you pick the Number 16? 16
18 games?

19 A. That's what you asked me to do.

20 MR. WILKINS: We would offer these into
21 evidence, Your Honor, these tickets under Tab 5.

22 THE COURT: Any objection?

23 MR. WHITSETT: Without objection.

24 THE COURT: Defendant's 1, Tab 5 into
25 evidence without objection.

1 (Defendant's Exhibit Number 1, Tab 5,
2 in evidence without objection.)

3 BY MR. WILKINS:

4 Q. I'm sorry. Do you know people who can
5 match your degree at Dragon's Ascent at Tab 5 that
6 you just referred to?

7 A. Yes, sir. I also know people who are
8 much better at it than I am.

9 Q. Do you know that from your market
10 research?

11 A. Yes, sir. Market analysis.

12 Q. And is it your experience that a player
13 gets better or worse by continuing to play this
14 machine?

15 A. Most people get much better at this
16 game over time.

17 Q. Why is that?

18 A. They practice it. They have learned
19 it. They study it. They watch others play it.
20 It's -- in some areas it's a following. It's fun.
21 They love it.

22 Q. Let's take a slot machine as a game of
23 chance. Do you get better over time the more you
24 play it?

25 A. On a slot machine?

1 Q. Yes, sir.

2 A. It's not up to the player at all.

3 Q. I'm sorry?

4 A. It's not up to the player at all.

5 Q. On a game of skill is your experience
6 that you get better or worse the more you play it?

7 A. You definitely get better over time.

8 Q. Do you get better if you play golf more
9 times than not you think?

10 A. Absolutely.

11 Q. Can you play this machine today?

12 A. I can.

13 MR. WILKINS: Your Honor, we'd like to
14 demonstrate to the Court very briefly. We're not
15 going to play 16 games here, but if
16 we could just play a few games just to show you how
17 the machine works with Mr. Brock at the wheel.

18 THE COURT: Any objection from the
19 State?

20 MR. WILKINS: To him playing? No, Your
21 Honor.

22 MR. WHITSETT: To him playing? No,
23 Your Honor.

24 THE COURT: Okay. I don't have a
25 problem with it.

1 MR. WILKINS: May the witness come
2 down, Your Honor?

3 THE COURT: Yes.

4 BY MR. WILKINS:

5 Q. Come on down. Now, Brock, if you
6 will, as you play this machine speak so the court
7 reporter can take down what you're doing.

8 We can't record if you put your hand
9 the stick or the shoot button. Tell us if you do
10 that so it will be recorded.

11 A. Will, do, sir. So I'm inserting a \$20
12 bill into play. The game comes up and asks me how
13 old I am, basically if I'm over 18 years old. It's
14 not how old I am, but if I'm over that age. I am.
15 I confirm it.

16 I now have \$20 worth of credit in the
17 game to play it. So right now I want to go through
18 and figure out which shot I want to take. I found
19 one. So what I'm doing is I'm looking at my shot
20 power balls.

21 I need to see which color is the best
22 shot for me. Right now that's the best shot on the
23 board. So that's the one I want to take. So with
24 patience and timing you can see that you can do
25 this. Now, you also have to know which one of

1 these dragons go with this vial as it's shown in
2 the instructions. It's also here in Group 3's
3 vial, the one in the middle, which is the shot I
4 want to take.

5 When I get all the way to the bottom of
6 these instructions it shows me what's what. So
7 let's go to Group 2 and Group 3. I know I want to
8 hit one of these two dragons or one of the ruby
9 rushes, which is denoted by the ruby.

10 I go back to where I was at. I wait
11 for the screen to clear. At this point I know that
12 that's -- none of those are going to come up. So
13 I'm going to wait until they do. This will last 30
14 seconds and then the dragon I want will start
15 coming on the screen.

16 One shot, one kill. My \$20 just turned
17 in to \$78. I will cash that in. Does anybody need
18 the ticket? I'll keep that separate. So I'll play
19 another. I put in another 20, then confirm it.
20 Once again, with the shots I've got in front of me
21 I'm not just going to shoot wildly.

22 So I can monitor what dragon comes up
23 next here. This vial will change. This order will
24 change on what it is. Technically right now it's
25 telling me the next dragon to come out like that is

1 going to be the punishment dragon in the game.
2 It's the one shot on the game you don't want to do.
3 What I want to do now is take advantage of what
4 comes of after this in the choreography.

5 So it may take just a minute. I'm
6 sorry. But with the way the vials are right now
7 there's nothing super advantageous to take care of
8 at this moment. This is one you definitely don't
9 want to hit. It's not only a loss of shot, but it
10 disables the turret for over three seconds.

11 Now, the next one that comes out is an
12 emerald stunner. It's a one-shot one kill dragon.
13 I know what it's coming next so I know to look for
14 it. It's coming in three seconds. So you've got
15 to hit it fast. All right.

16 As you watch what it does it makes all
17 my shots increase in value. That was -- 104
18 percent of that value was added to my next shot.
19 So now what I'm going to do is take advantage of
20 one of the smaller things.

21 Obviously my left-hand vial is the
22 fullest. It's telling me it's about four times or
23 five times what my actual shot cost is. This is
24 not the thing to do. So I'm going to wait. Once
25 again, \$20.20, I won. I cash out again. It is a

1 winning session. Two games in a row. Another \$20
2 inserted. Go back through. All right. Now, I'm
3 looking for my next thing, left hand vial is
4 actually really good.

5 So I can come in here and pick another
6 target. Okay. Now, this next shot we'll get a
7 winner. At 20 cents I'm still at a winning
8 session.

9 So I'll continue forward. There we go.
10 Ten shots. That was a 104. Actually, it was 110
11 percent because I was playing at -- I got it and
12 \$20 and I'm still ahead. This time that's still
13 not a bad shot to start. Oh, bad shot.

14 Q. Brock.

15 A. Yes, sir.

16 Q. How many games have you played?

17 A. Three in a row so far.

18 Q. I'm satisfied with you playing and
19 finishing out with this game, but you can play as
20 long as the State wants you to play.

21 A. Okay.

22 THE COURT: He's fine. Are you
23 worrying about me being able to see?

24 THE WITNESS: I can be. I haven't won
25 this one yet, but I can be soon. Give me just a

1 minute. I'm sorry. It takes some time.

2 EXAMINATION

3 BY MR. WHITSETT:

4 Q. How many games have you shot?

5 A. I'm not keeping track here. That's not
6 my intent.

7 Q. What's your amount here?

8 A. I'm at 19.30 of 20.

9 Q. For the record, what's your value at
10 this point?

11 A. 18.90. I'm about to add -- it could
12 take me a while, sir. It's definitely not
13 something set in stone on time, but I will try to
14 hurry up for the Court.

15 Q. For the record, what are we at?

16 A. 17.70.

17 EXAMINATION

18 BY MR. WILKINS:

19 Q. What?

20 A. 17.70.

21 Q. Cash out and let's go to the stand.

22 A. I can unless you want me to win this.

23 Q. No. How many games have you played?

24 A. Singular games, I don't know. I've got
25 three winning sessions in a row and started a

1 fourth but we don't have the time.

2 Q. I think we've done enough. You've got
3 three tickets. Is that right, Brock?

4 A. Yes, sir. That's correct.

5 MR. WILKINS: Are you done with the
6 play or --

7 EXAMINATION

8 BY MR. WHITSETT:

9 Q. Are you going to get your money?

10 A. I don't --

11 Q. Are you going to take the last one?

12 A. I'd actually like to finish playing it,
13 but I don't have to.

14 MR. WILKINS: In the essence of time
15 I'd ask the witness to quit playing so we could
16 move on with the trial. Thank you for your
17 indulgence, Your Honor.

18 MR. WHITSETT: For the record, on the
19 fourth play it's a different amount than the others
20 if we do not have that ticket in the record.

21 THE WITNESS: We can do that or I can
22 finish playing or whatever. That's up to the
23 Court.

24 THE COURT: I mean, if it's for
25 demonstrative purposes we probably need that ticket

1 too, right? I don't want him to lose his money,
2 you know. That's kind of to the point. Right?

3 MR. McCOY: Let him finish it, Judge.

4 THE COURT: I don't understand. Is the
5 issue that you're worried about losing the 20
6 bucks? Is that what's going on?

7 MR. WHITSETT: No, Your Honor. I told
8 him he could open the machine and get the money.

9 THE WITNESS: No. It's definitely not
10 about that.

11 THE COURT: Then just cash it out and
12 you can get the money afterwards.

13 MR. McCOY: Let's finish playing.

14 THE WITNESS: I'll finish playing.

15 MR. WILKINS: Just finish that one game
16 and we'll move on.

17 BY MR. WHITSETT:

18 Q. You'll finish that one game, right?

19 A. No.

20 Q. One session?

21 A. I put in \$20. I can't lose \$20 on a
22 shot.

23 Q. For the record, what is your value
24 at this point?

25 A. 16.50.

1 Q. For the record, where are we?

2 A. 15.70.

3 Q. Where are we at the moment?

4 A. 13.90.

5 Q. Is that six shots on the same dragon?

6 A. I don't know. I wasn't counting.

7 Q. Did you successfully kill that dragon?

8 A. What do you mean?

9 Q. Did you capture that dragon that you
10 just hit?

11 A. Not yet.

12 Q. For the record, where are we
13 money-wise?

14 A. 13.30, sir. For the record, I'm at
15 1210.

16 Q. Where are we now for the record?

17 A. 9.70.

18 Q. 9.70. For the record, what was that
19 that you said?

20 A. I'm sorry?

21 Q. For the record, what was that you said?

22 A. I said too fast. I didn't want to
23 target incorrectly.

24 Q. Where are we for the record?

25 A. One second, please, sir. We are at

1 8.10 right now.

2 Q. And we're at 7.10 for the record?

3 A. That's correct.

4 Q. All right. 6.10 for the record. Is
5 that correct?

6 A. That would be correct.

7 Q. Now, we're at 4.90 for the record?

8 A. Yes. That's correct.

9 Q. You're at 3.50 for the record?

10 A. That's correct.

11 Q. We're at 2.70 for the record. Now
12 we're at 1.90 for the record. Is that correct?

13 A. That's correct.

14 Q. All right. Seventy cents for the
15 record. Now we're at 50 cents. Is that correct?

16 A. That's correct.

17 Q. All right. Ten cents.

18 A. Yep, which means during my session I'm
19 going to add more money to keep playing until I
20 win.

21 THE COURT: We probably need to shut it
22 down at this point. I don't know.

23 MR. WHITSETT: Your Honor.

24 THE WITNESS: Please, just a few more
25 minutes. Just a few more minutes. It's coming.

1 I can only calculate so fast.

2 MR. WILKINS: Judge, I guess it's a
3 blessing in disguise the game has no time limit.

4 THE COURT: Or that you guys only had
5 three witnesses so far. Is that right? Three?

6 BY MR. WHITSETT:

7 Q. We're at 18.30 of your second 20. Is
8 that correct?

9 A. That's correct.

10 Q. Now we're at 17.50. We're at 15.30 for
11 the record. We're at 14.50 for the record. We're
12 at 13.30 for the record. We're at 12.50 for the
13 record. Now it's 11.90.

14 THE COURT: I mean do we need to keep
15 doing this? I'm trying to figure out, from either
16 side's perspective do y'all want to this to
17 continue? I'm asking either side. It I don't
18 care.

19 MR. WHITSETT: It's their witness, Your
20 Honor.

21 THE COURT: No. I'm fine.

22 MR. WILKINS: Plus it's entertaining.

23 THE COURT: But I'm fine. I've got
24 time. I'm not trying to rush anybody for sure. I
25 mean I don't want to -- we don't need to play all

1 day, but if there's a point to this, you know, you
2 can continue. Continue to let him play. I don't
3 know.

4 MR. WILKINS: Judge, while he's playing
5 may I be excused?

6 MR. WHITSETT: Judge, we can take a
7 break for a second?

8 THE COURT: Not a problem. We'll be
9 off the record while he continues to play and you
10 know y'all take a break. I assume he's not going
11 anywhere.

12 THE COURT: We'll just you know. We'll
13 take a break after that if you want.

14 THE WITNESS: I would appreciate that.

15 THE COURT: Not a problem. If you do
16 take a break don't discuss your testimony.

17 (A recess transpired.)

18 EXAMINATION

19 BY MR. WILKINS:

20 Q. Since you finished playing the machine
21 do you have any tickets --

22 A. I do.

23 Q. -- from the machine?

24 A. I have four right here.

25 Q. Let's identify the Ticket Number 201.

1 A. Yes, sir. This is the first ticket I
2 played for when I put in \$20 and I cashed out \$78.

3 Q. How much money did you put in?

4 A. \$20.

5 Q. You cashed out 17?

6 A. 78.

7 Q. 78?

8 A. Yes, sir.

9 MR. WILKINS: I'd like to offer this
10 ticket into evidence.

11 THE COURT: Any objection?

12 MR. WHITSETT: No objection.

13 BY MR. WILKINS:

14 Q. How about 202?

15 A. 202 would have been the second ticket I
16 put in. I put in \$20 and I cashed out \$20.20.

17 Q. The third ticket you played?

18 A. Yes, sir. On this one I inserted \$20
19 into the machine. I cashed out \$20 and a penny.

20 Q. Thank you. We've got them all.

21 A. You want to go with the fourth one?

22 Q. That's Number 4 you testified?

23 A. Yes, sir.

24 Q. I'll refer you to Ticket 204.

25 A. Yes, sir. This is the one where I put

1 in \$40 and cashed out 40.50.

2 Q. I see. Thank you. Let me ask you
3 whether or not you agree with this statement: The
4 player's success depends on the eye-hand
5 coordination, pattern recognition, visual skills,
6 timing, accuracy in aiming, the reflexes, the
7 reaction time, dexterity, mental attitude and
8 ability to focus and concentrate.

9 A. Yes, sir.

10 Q. While you were playing the game were
11 you under any stress did you feel?

12 A. Sure.

13 Q. How long did you play?

14 A. I don't know to tell you the truth.

15 Q. Did you feel any anxiety or stress as
16 you played?

17 A. I'm not sure.

18 Q. Okay. Just a couple of more questions,
19 Mr. Smith. There was some testimony about this
20 from SLED Agent Wood. If the same shot value is
21 used and the color is matched that you -- we
22 earlier heard testimony matching the two up is a
23 reward going to be the same for each player who has
24 the same shot value and matches the same color?

25 A. Could you repeat it one more time, sir.

1 Q. Assuming that I've got -- I'm playing
2 and I've got the same shot value that I put into my
3 gun and I match my dragon -- my shot with a dragon
4 that's color matched and you do the same thing on
5 another machine let's say --

6 A. As long as I get the same shot --

7 Q. -- will my reward be the same?

8 A. It will if I do the exact same skill,
9 if I do the exact same strategy. If I do -- have
10 the exact same shot power the outcome will be
11 exactly the same.

12 Q. Is it possible for a shot to capture a
13 dragon or hit a dragon off the screen?

14 A. No.

15 Q. So once the dragon is gone from the
16 screen that dragon is no longer a target or is it?

17 A. No. It cannot be a target.

18 Q. Does this game have a free play
19 feature?

20 A. It does not.

21 Q. What is the free play or the free shot
22 that shows up on the screen that says free shot?
23 What does that mean?

24 A. Free shot is just an extension of your
25 play and it's just an entertaining experience to

1 the player.

2 Q. Do you win or lose anything by taking a
3 free shot?

4 A. No.

5 Q. Let me ask you one final question.

6 A. Yes, sir.

7 Q. Whether or not -- I'm asking if you
8 agree with this statement or if you do not agree
9 with it, if it's true in your judgement or if it
10 false: When considering whether elements of skill
11 are involved in the playing of a game one should
12 look to the game's requirements that the player
13 exercises such things as manual dexterity, eye-hand
14 coordination, reflexes, muscular control and
15 concentration.

16 Intellectual abilities have to be
17 viewed as an important element in determining the
18 outcome of a game in which skill dominates. Do you
19 agree or not agree?

20 A. I agree.

21 MR. WILKINS: For the record, I'm
22 quoting from our Attorney General's recent opinion.
23 Now, just for the record, Your Honor, I'd like to
24 introduce Tab 4 into evidence. It's his history,
25 background and employment history.

1 We can remove Tabs 6 and 7 from
2 Defendant's 1 because they've already been
3 introduced by SLED in one form or another. It's
4 just pictures of the machine. Thank you.

5 THE COURT: Okay.

6 (Defendant's Exhibit Number 1, Tab 5
7 entered into evidence.)

8 MR. McCOY: Judge, briefly, are these
9 tickets -- did you enter all of them or just the
10 first one? I just wasn't sure.

11 MR. WILKINS: I meant to enter all four
12 exhibits.

13 THE COURT: Any objection?

14 MR. WHITSETT: No.

15 THE COURT: All right. What are these
16 going to be number-wise?

17 MR. WHITSETT: You can have them 2, 3,
18 4 or you can --

19 THE COURT: Yeah. I mean, I think
20 everything else is Number 1, Tab 1 and all that.
21 So it's 2, 3, 4, 5?

22 MR. McCOY: It will be 2, 3, 4 and 5.

23 (DEFENDANT'S EXHIBIT 2, Ticket 201, was
24 marked for identification.)

25 (DEFENDANT'S EXHIBIT 3, Ticket 202, was

1 marked for identification.)

2 (DEFENDANT'S EXHIBIT 4, Ticket 203, was
3 marked for identification.)

4 (DEFENDANT'S EXHIBIT 5, Ticket 204, was
5 marked for identification.)

6 BY MR. WILKINS:

7 Q. While they're putting the stickers on
8 there tell us about the rainbow dragon. What is
9 that?

10 A. The rainbow is a prized dragon. It's
11 just on a fixed prize.

12 Q. Does the price change? Does the value
13 change up or down?

14 A. The value does.

15 Q. What makes it change?

16 A. Every shot. Every shot a player takes
17 increases the value of that.

18 Q. Can you tell what the value is looking
19 on the screen.

20 A. It tells you exactly what the value is
21 currently.

22 Q. When you take a shot at that dragon do
23 you take into account the cost of your shot
24 compared to the price you might or will win if your
25 maim aim is correct?

1 A. No. The price -- you're shot cost has
2 nothing to do with what that's going to pay. You
3 could win that if you are playing at a dime or you
4 could play through any of the play values up to \$2
5 and win the exact same prize.

6 MR. WILKINS: Thank you, Mr. Smith.

7 THE COURT: All right. Any questions?

8 MR. WHITSETT: Briefly, Your Honor.

9 EXAMINATION

10 BY MR. WHITSETT:

11 Q. So that we're very clear, I believe
12 it's Number 5 that is a \$40 ticket. Correct?

13 A. Correct.

14 Q. You put in \$20 originally, correct?

15 A. I did.

16 Q. You played as the game designer --
17 correct --

18 A. Correct.

19 Q. -- and lost every bit of your first
20 \$20?

21 A. That would be incorrect. I still had a
22 dime and inserted another \$20.

23 Q. Okay. But you were playing at 20 cents
24 and could not shoot that, correct.

25 A. I could shoot it. I shot it

1 successfully every time.

2 Q. So let's talk about that. You shot
3 what you were aiming at successfully every time.
4 Correct?

5 A. That would be correct.

6 Q. You went down from \$20 to a dime?

7 A. That's correct.

8 Q. And what was different was the screens
9 and the dragons on the screens, correct?

10 A. What do you mean different?

11 Q. It's different in every -- between
12 every shot that you took was where the machine was
13 at that time, correct?

14 A. No. I don't understand. You're going
15 to have to rephrase that, please.

16 Q. Sure. How many times did you shoot on
17 that first \$20?

18 A. I don't know. A lot.

19 Q. A lot?

20 A. Yeah.

21 Q. And you successfully hit on every one
22 of those, right?

23 A. I did.

24 Q. And it did not return a value?

25 A. Yes, it did. By the time I was done

1 playing the game it returned more of a value than I
2 actually put in the machine in total.

3 Q. So each time game -- each play you
4 played successfully and you did not get a
5 successful result?

6 A. That was not the strategy I was going
7 for on that.

8 Q. Okay.

9 A. I think I showed previously on the
10 tickets before that I could win in one shot.

11 Q. But could not at that point on that --

12 A. I wasn't trying to. I had a whole
13 different strategy.

14 Q. Okay. And your testimony is predicated
15 on someone having studied the entire manual --
16 correct --

17 A. Correct.

18 Q. -- and having memorized and watched and
19 studied all of this. Correct?

20 A. Sure.

21 Q. And with your \$20 you were not able
22 to successfully destroy dragons on every shot.
23 Is that correct?

24 A. Which \$20?

25 Q. The third \$20, the one that we sat here

1 for over half an hour on.

2 A. The very first one I did not
3 successfully capture a dragon on those shots which
4 is why I put another 20 in and then successfully
5 won my play station by winning more money out than
6 I actually put in.

7 Q. Sir, the only way you could have done
8 that was to commit more money?

9 A. I don't understand the question.

10 Q. You had to commit more money, correct?

11 A. More money than the original \$20? Is
12 that what you're asking?

13 Q. Yes.

14 A. Yes, I did.

15 Q. And at no point did you attempt to
16 shoot the rainbow dragon?

17 A. No.

18 Q. Could you in one shot capture it?

19 A. Probably not. It's not in there. As
20 a matter of fact, the manual will tell you that
21 it won't. If you go to the information there
22 are three that it tells you are one-shot kills
23 every time.

24 Q. Sure. So can you one-shot kill that?

25 A. I would say that you -- it can be a

1 one-shot kill. If I walked up to the machine and I
2 used my calculation to see what it is I haven't
3 been currently playing before that. So I walk in.
4 I see that value and I understand what that number
5 means and I start attempting to try and shoot that.
6 It could be.

7 Q. It could be?

8 A. There is a point in time. It could be.

9 Q. At a point in time?

10 A. Uh-huh.

11 Q. So what is that point in time?

12 A. Excuse me?

13 Q. What is that point in time?

14 A. For what?

15 Q. When that will happen.

16 A. When what will happen?

17 Q. The successful shot on the rainbow
18 dragon.

19 A. The one kill and one shot on that?

20 Q. Yes.

21 A. It depend on the machine. It depends
22 on the VAS that you see up there. The shot power I
23 believe is what we've been calling this. Right?
24 The shot power is based on what you're doing, how
25 you're shooting it, your coordination, your color

1 match and everything like that.

2 Q. So how many shots?

3 A. Shots for what?

4 Q. To successfully capture that dragon.

5 A. That one?

6 Q. Yes.

7 A. I would have to go into it and look at
8 it, figure it out and calculate it.

9 Q. Okay.

10 MR. WHITSETT: Beg the Court's
11 indulgence just one second.

12 BY MR. WHITSETT:

13 Q. Let's talk just a minute about the
14 different level settings and different versions
15 that we looked at earlier. There are five levels
16 settings and five different versions corresponding
17 to letters, correct? It's levels 1 through 5 and
18 Versions A through E --

19 A. Okay.

20 Q. -- that exist on this machine, correct?

21 A. Those screens you showed me do exist on
22 that screen.

23 Q. Okay. I'm going to show you what's
24 marked as Plaintiff's Exhibit 10 and 11. Are those
25 visual representations of an audit that came up in

1 Mr. Farley's testimony?

2 A. One second and let me get my glasses.
3 Okay.

4 Q. Are those fair and accurate
5 representations of the menu on this device at
6 different points in time?

7 A. It could be, yes.

8 MR. WHITSETT: Okay. I would move to
9 admit 10 and 11 in the record.

10 THE COURT: Any objection?

11 MS. WILKINS: No.

12 BY MR. WHITSETT:

13 Q. Those ARE just visual representations
14 that this machine tracks cash in and cash out.
15 Correct?

16 A. That would be correct.

17 Q. They track the whole percentage --
18 correct --

19 A. They do.

20 Q. -- and the return percentage?

21 A. It does.

22 Q. And the games played, it's Games 1.
23 Is that correct?

24 A. That's correct.

25 Q. What is the current fill?

1 A. What are you asking?

2 Q. There's -- the current fill is one.

3 What is the current fill?

4 A. That is -- the fill on that machine is
5 used to track its playability. In other words,
6 it's a licensing fee that is paid to have people
7 run this machine.

8 Q. And does it reduce as people play the
9 percentage of the fill?

10 A. It can. It can also go up.

11 Q. What determines up or down?

12 A. What do you mean? I'm sorry.

13 Q. You said it can go up or down. What
14 determines that?

15 A. That determines it's -- this one -- I
16 don't know if this came from that machine or not.
17 It depends on the machine and the location where
18 it's at.

19 Q. Okay.

20 A. It's used for different things across
21 the country in different ways.

22 Q. So you don't know what that is on
23 this device?

24 A. I haven't looked at that specifically
25 on this, no.

1 Q. Have you ever viewed anyone in this
2 location play this device?

3 A. In which location?

4 Q. LJ's by the Creek (sic).

5 A. I have never been in LJ's by the Creek
6 (sic) that I know of.

7 Q. So your testimony is not based on any
8 viewing or any actual -- the individuals that have
9 played in this location?

10 A. I have not been in that location.

11 MR. WHITSETT: Okay. I don't think I
12 have any further questions, Your Honor.

13 THE COURT: Anything further?

14 EXAMINATION

15 BY MR. WILKINS:

16 Q. I forgot to ask you. Did you have
17 delivered to the witness who testified for the case
18 in chief -- our case in chief Mr. Farley a machine
19 similar to the one in the courtroom?

20 A. That is correct, sir.

21 Q. Was it identical in every respect?

22 A. It was.

23 Q. Inside and out?

24 A. Software, hardware. Everything.

25 Q. Any difference whatsoever?

1 MR. WHITSETT: This is well beyond the
2 scope.

3 MR. WILKINS: Okay.

4 THE COURT: I'll allow it.

5 QUESTIONS

6 BY THE COURT:

7 Q. I just have a question or two. Why do
8 we have -- maybe I'm just missing something, but
9 why are we having -- why is there a requirement the
10 person be 18 to play this game?

11 A. As far as I know we've always had that.
12 Most of these are in liquor establishments anyway.
13 Some are not. Some are in restaurants or 7-Elevens
14 and places like that.

15 Q. Okay.

16 A. But to have an adult --

17 Q. I was just curious. I didn't know if
18 there was a reason behind it.

19 A. In certain states for skill games a lot
20 of times it is required to either be 18, 19 or 21
21 depending on the state.

22 Q. Okay. So there are certain states that
23 a video game is only based on skill and you have to
24 be 18 to play?

25 A. That's correct.

1 Q. So like Pac-Man? It's based on skill,
2 right?

3 A. I wouldn't say no, but --

4 Q. I'm trying to figure out because the
5 SLED agent testified earlier and I didn't agree
6 with him that somebody could not -- that using a
7 joystick could not involve skill and, you know, go
8 play some -- some of my neighbor's kids in Madden
9 or something and I promise you you'll find that out
10 that you know there is a lot of skill that is
11 involved with that.

12 I was just curious on that. What makes
13 these vials fill up?

14 A. So the vial themselves are shot
15 previews. It's a preview of the next shot, shot
16 power, how much damage you're going to do to the
17 next dragon.

18 Q. Right. So does it start with a vial
19 filled up? That's what I'm trying to figure out.

20 A. It starts in a preselected list on a
21 schedule of events. The list it comes from is an
22 average shot cost of one. It's a variability
23 script in the math that we put together because if
24 not and it was worth the same thing every single
25 time the game would be very boring.

1 Q. Okay. So the vials determine the value
2 of the shot and the value of the shot -- and the
3 vials are determined by the computer?

4 A. No, sir.

5 Q. Okay. Explain that to me in -- you're
6 the computer guy. I'm not --

7 A. Sorry. Those vials are set in a
8 presequence at the factory. That is correct.

9 Q. Okay.

10 A. The machine decides nothing. It
11 grabs the next one in line. The other thing that
12 changes --

13 Q. You're talking about the software that
14 you've created? It's preselected?

15 A. It doesn't preselect. It's a list that
16 I generate personally.

17 Q. Okay.

18 A. It's held in there and so --

19 Q. It's in the software?

20 A. Yes, sir.

21 Q. I'm not talking about the machine
22 itself.

23 A. Okay.

24 Q. I'm talking about the software for the
25 machine.

1 A. Correct.

2 Q. It fits whatever vial on that next
3 list and it's not scrambled or anything?

4 A. No, sir.

5 Q. It is a sequence?

6 A. It is a sequence. It runs through and
7 it when it gets to that end of that sequence it
8 restarts and repeats.

9 Q. Okay. I had that question and was
10 trying to figure that out when you were --

11 A. It's also that. It's dependent on your
12 color match. It's the shot value it's getting on
13 that one shot, but as you color match it then that
14 marries what that is.

15 Q. Well, the color match is whatever color
16 the vial is. Right?

17 A. No, sir.

18 Q. Okay. I missed that, too. So explain
19 that to me.

20 A. So the color itself --

21 Q. The vials are color matched, too.
22 Right?

23 A. They are. Unfortunately it's like
24 being sure everybody understands that -- people can
25 get color. It's not meant to be confusing, though

1 maybe it seems to be a little. The vials
2 themselves are separate from color match.

3 Color match is -- is the color of the
4 bullet at the time it impacts the dragon. So the
5 little spinner on there that shows how the -- the
6 different colors on it, the eight different colors
7 as it spins around so that it will help you time
8 your shot so -- when you want to land on that
9 dragon.

10 Q. Got you.

11 A. The vials themselves unfortunately are
12 similar colors because it's really easy to see
13 eight colors that will pick themselves apart. So
14 that's how we've begun. Anyway, those are
15 explained in there as different vials explained on
16 maybe I think Page 3 of the instruction manual.

17 Q. Of the instruction manual?

18 A. Yes, sir.

19 THE COURT: Okay. That makes sense. I
20 admittedly haven't read the whole instruction
21 manual yet. Sorry. If y'all need follow-up
22 questions for those I just was curious. So any
23 follow-up questions as to what I said?

24 MR. WILKINS: None, Your Honor.

25 THE COURT: All right. Anything else?

1 MR. WILKINS: I'd like to deliver these
2 four exhibits.

3 THE COURT: We've got the original
4 here that's in evidence. It's not marked I don't
5 believe.

6 MR. TAPP: If it's in evidence that's
7 probably irrelevant.

8 THE COURT: I didn't know if y'all
9 needed that. Is this for me or the exhibits you
10 want in evidence? You have a copy that's in
11 evidence somewhere?

12 MR. McCOY: Judge, the folder that we
13 gave you, we are okay with having that be our final
14 exhibit for the Court. We're removing Tab 6 and 7.

15 THE COURT: That's what I was about to
16 say. I want to make sure I had the ones y'all were
17 in evidence.

18 MR. McCOY: That's correct. Then our
19 other --

20 THE COURT: Tab 6 and 7 are the
21 pictures y'all didn't want in?

22 MR. McCOY: Correct.

23 THE COURT: Not a problem. I'm trying
24 to -- you know, housekeeping a little bit.
25 Normally you guys have -- any further questions for

1 Mr. Smith? We'll let him step down. Thank you,
2 sir.

3 All right. I know y'all want to
4 probably argue a little bit. So I will let y'all
5 give a closing statement if you want to. If you
6 don't want to that's fine.

7 MR. WILKINS: Your Honor, I'll be glad
8 to waive closing statement and submit anything in
9 writing.

10 THE COURT: If you don't mind.

11 MR. WHITSETT: Proposed orders.

12 THE COURT: I'll ask her how long she's
13 going to take because I don't want to give y'all 30
14 days and she's going to take, you know, 25 or 30 or
15 whatever.

16 THE COURT REPORTER: Yes sir. If they
17 need it expedited they can but normal turnaround
18 time is a week to ten days.

19 THE COURT REPORTER: That's what I
20 mean. I know y'all want that and I probably would
21 like a copy, too, if y'all are going to use it in
22 the brief.

23 MR. WILKINS: How about 30, Judge?

24 THE COURT: Thirty is fine. I'll get
25 an order.

1 MR. WHITSETT: Subject to us getting
2 that, but if we don't do that I'm sure we can work
3 that out.

4 THE COURT: Yes. I just want to make
5 sure she has enough time to prepare it. I know you
6 want that before you give me the proposed order.
7 We'll take it under advisement. I want to make
8 sure the State's exhibits -- the photos we have
9 seven of them. Is that right? Or eleven?

10 MR. WHITSETT: Thirteen.

11 THE COURT: Entered into evidence
12 without objection.

13 MR. McCOY: Yes, sir.

14 THE COURT: That's what I thought.
15 It's thirteen. Okay. I thought we had one
16 objection to the one exhibit. Anything else y'all
17 need from me?

18 MR. McCOY: I can't think of anything.
19 Have a great weekend.

20 THE COURT: Thank y'all.

21 (The hearing was adjourned at 3:47 PM.
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CERTIFICATE OF REPORTER

I, Priscilla Nay, Court Reporter and Notary Public for the State of South Carolina, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 9th day of February, 2022 at Charleston, Charleston County, South Carolina.



Priscilla Nay

Priscilla Nay,
Court Reporter
My Commission expires
December 10, 2031

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1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF BERKELEY) TRANSCRIPT OF RECORD

3 -----x
1 DRAGON'S ASCENT VIDEO)
4 GAMING MACHINE; SC GAMES OF)
SKILL, LLC,)
5)
Appellants,)
6 vs.)
7 SOUTH CAROLINA LAW)
ENFORCEMENT DIVISION (SLED),)
8)
Respondent.)
9 -----x

Case No. 2022-CP-08-02026

December 12, 2022
(Heard in Charleston, SC)

11 HEARING ON MOTIONS

12 B E F O R E:

13 The Honorable Bentley D. Price, Presiding Judge

14 A P P E A R A N C E S:

15 William "Billy" Wilkins, Esq.
16 Chris Murphy, Esq.
Peter McCoy, Esq.
17 Attorneys for the Appellants

18 Adam Whitsett, Esq.
19 Attorney for the Respondent

20 Also present:
21 Judge Markley Dennis
Rick Tapp

24 Court Reporter: Bobbi Fisher, RPR
25 SC Official Court Reporter III

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(None.)

P R O C E E D I N G S

(The following proceedings started at 1:12 p.m.):

THE COURT: All right. So we have a magistrate appeal. For the record, this is from Berkeley County, and I have reviewed all of the filings in this case, magistrate's return to order, and everyone else's memorandums. So I am caught up to speed on what's going on.

All right. Who would like to go first?

MR. WILKINS: I will, Your Honor.

THE COURT: All right.

MR. WILKINS: Your Honor, my name is Billy Wilkins, and with me at counsel table is Chris Murphy and Peter McCoy.

Dragon's Ascent is an aim-and-shoot video game in which the player uses a joystick and a button to aim at and shoot dragons, and the dragons come in various sizes, colors, and values, and they move across the screen in a set, recurring pattern.

Here's how the magistrate described -- and he did so correctly -- Dragon's Ascent in his order. He says, [as read] "Just as with any game of skill, a player successfully may play Dragon's Ascent using keys, hand/eye coordination, memorization, recognition of learned patterns, timing, accuracy, and aiming, reflexes and

1 reaction time, manual dexterity, mental attitude,
2 concentration, and deductive analysis."

3 Almost 100 years ago, our Supreme Court, in *Harvie*
4 *vs. Heise*, held that -- and I quote from that decision --
5 "where a woman who plays a slot machine stands to win or
6 lose by hazard or chance, the machine is a gambling
7 device."

8 Ten years later, our Supreme Court, in *Alexander v.*
9 *Martin*, repeated this and stated: "There are three
10 elements of gambling: Chance, price, and prize," the
11 Court said.

12 In 1971, in *State vs. DeAngelis*, our Supreme Court
13 affirmed a defendant's conviction for operating a device
14 pertaining to games of chance, and in this decision, the
15 Court observed that no skill was required in playing the
16 electronic game in question.

17 And then, moving forward to 2010, Judge, Chief
18 Justice Beatty, writing for unanimous Supreme Court, in
19 *Ward vs. West*, held that a pull-tab game machine
20 constituted illegal gambling under 12-21-2710 because all
21 of the three elements of gambling were present: Payment
22 of consideration to play a game that was based on chance
23 for a reward.

24 Applying this definition, the test used to
25 distinguish between lawful activity/skill games, and

1 unlawful activity/chance games is known as a Dominant
2 Factor Test sometimes referred to as a skill versus chance
3 test. This is a test applied by South Carolina courts and
4 the majority of jurisdictions throughout the country. It
5 is the test relied upon time and time again by the
6 Attorney General in its opinions that it issues, and SLED
7 has consistently advocated the application of the dominant
8 factor test and, in fact, did so in this case.

9 For example, SLED, in *Speedmaster*, in 2011, the
10 South Carolina appeal stated, and I quote, "SLED advocates
11 the adoption of the dominant factor test as the correct
12 test to use in determining if a machine is a gambling
13 device."

14 The Court of Appeals then cited to the *Ward vs.*
15 *West* decision that I just referred to, authored by Chief
16 Judge Beatty, and repeated the three necessary elements to
17 constitute gambling.

18 The Court of Appeals also cited the statutory
19 definition for gambling, South Carolina Code Section
20 3-11-100, subsection 2: "Gambling or a gambling device
21 means any game of chance."

22 The Court of Appeals then affirmed the magistrate's
23 ruling that *Speedmaster* was not a game of chance but, in
24 fact, was a game of skill and, thus, was legal.

25 Its skill predominates over chance in our courts,

1 including our Supreme Court in *Allendale County vs. Two*
2 *Chess Challenge II*, had consistently ruled that the game
3 is legal, and if chance predominates over skill, our
4 courts have said time and time again, the courts have said
5 the device is a gambling device and, thus, is unlawful;
6 games like video poker, slot machines, craps, and
7 roulette.

8 In this case, overwhelming evidence is that Dragon's
9 Ascent is a game of skill. Two witnesses, both of whom
10 who were qualified by the Court as experts, testified that
11 Dragon's Ascent is, in fact, entirely based on skill. One
12 was Mr. Nick Farley. He's testified as an expert witness
13 in over 50 times regarding the analysis and evaluation of
14 gaming machines. He actually was retained by our Attorney
15 General in another case, retained by SLED in another case
16 as their expert witness.

17 The other witness is an expert witness, Mr. Brock
18 Smith, who extensively trained in computer science and the
19 like and was the designer and developer of Dragon's Ascent
20 and did so with the goal of designing a machine that was
21 based upon skill as opposed to chance.

22 And here's what the magistrate held, and I quote
23 from page 8 of his order: "Based on the evidence
24 presented at the hearing, the Court finds that Dragon's
25 Ascent is a game in which skill predominates over chance."

1 Now, that should have ended the analysis. Judgment, at
2 that point, should have been entered for Dragon's Ascent.

3 Importantly, SLED did not appeal. Without any
4 question, all established trust, it says, that is now the
5 law of the case. Dragon's Ascent is a game of skill
6 pursuant to the predominant factor test.

7 SLED actually does not dispute this if they didn't
8 appeal, and it's the law of the case, but they spend a
9 lion's share of their brief devoted to this issue; that
10 is, the dominant factor test and so forth.

11 After holding, though, that Dragon's Ascent is a
12 game of skill, the magistrate then adopted SLED's fallback
13 position and erroneously reasoned that, in a divided
14 Supreme Court decision handed down in 2012, the *Chimento*
15 case rewrote the law and definition of gambling in South
16 Carolina and did away with these recognized and
17 consistently applied elements found in the predominant
18 factor test and replaced it with a new test, which is
19 called, I think, at least referred to as the new wagering
20 test.

21 In fact, the *Chimento* decision did not even mention
22 the statute applicable to the case before this Court, and
23 that is 12 -21-2710 and 2720, but it dealt entirely with a
24 different statute: 16-19-40. It's an appeals statute,
25 making it a crime to place specifically enumerated games

1 in specifically enumerated places, a statute that Chief
2 Justice Toal stated was hopelessly outdated and one whose
3 usefulness has long expired.

4 The magistrate held, and I quote: "Using the
5 *Chimento* Court's reasoning, the Court finds that, even
6 though *Dragon's Ascent* is a game in which skill
7 predominates, a person gambles when money is wagered in
8 the playing." The magistrate, thus, lifted this new
9 wagering test and ruled that it applied universally across
10 the board to every game being played anywhere in South
11 Carolina.

12 The magistrate ruled that games of skill and games
13 of chance are both illegal in South Carolina, even though
14 Chief Justice Beatty's *Ward vs. West* decision and others
15 going back at least to the early 1900s have held that
16 gambling is defined by three elements: consideration,
17 chance, and reward.

18 SLED contends that the magistrate erased the skill
19 versus chance test from the law books, which is
20 unprecedented, and, in my judgment, an improper judicial
21 maneuver, which SLED wholeheartedly endorses. Now,
22 according to SLED, it does not matter what you call it.
23 You tender something of value, give consideration, bet,
24 wager, pay a required membership fee to play, place
25 currency into a slot, pay an entry fee -- all it comes

1 down to, according to SLED, if anyone pays to play any
2 game to win a prize that participant has violated the law
3 of South Carolina.

4 And the magistrate did so notwithstanding the fact
5 that the *Chimento* decision was only talking about 16-19-40
6 and never even cited to the statute in question before the
7 Court today, 12-21-2710.

8 And the magistrate did so in spite of the fact that
9 *Chimento* never stated that it was overruling any of these
10 prior decisions going back for many, many years. They
11 were a consideration to play a game based on chance to win
12 a prize and replacing it with a two-prong test. You pay
13 consideration to win a prize, it makes no difference what
14 game you're playing.

15 Finally, the magistrate held, on page 12: "Although
16 Dragon's Ascent is a game in which skill predominates, a
17 person gambles when money is wagered in so playing. To
18 hold otherwise," the magistrate said, "would effectively
19 legalize wagering and payouts for all games of skill,
20 including golf and the like."

21 On page 7 of its brief, SLED, again, embraces the
22 magistrate's holding that playing to play in a skill game
23 like golf to win a prize is now illegal in South Carolina.

24 So, according to the magistrate, and equally
25 astonishing, according to SLED, under its pay-to-play

1 test, it is now illegal to play in local golf tournaments
2 around the state, to play a closest-to-the-pin game at a
3 par 3 golf course, to play in The Heritage Classic
4 Tournament at Hilton Head, to drive a race car at the
5 Darlington 500, or to play tennis in the Credit One
6 Charleston Open tennis tournament.

7 According to the magistrate, all of this is illegal
8 now in South Carolina.

9 Thank you, Your Honor.

10 THE COURT: Thank you very much.

11 Yes, sir?

12 MR. WHITSETT: Good afternoon, Your Honor. May it
13 please the Court? My name is Adam Whitsett. I am general
14 counsel with SLED here today asking that Your Honor uphold
15 and affirm the magistrate's finding that this device is an
16 illegal gambling device prohibited by South Carolina law.
17 To that end, I submit that Judge Deaton correctly applied
18 the law and jurisprudence to the evidence in this case.

19 Your Honor, the evidence in this case established
20 that an individual can walk up to this machine, can put a
21 dollar in, and can win cash by playing this device. In
22 fact, the evidence in this case was that the rainbow
23 dragon flashing across the screen, with the only visible
24 dollar amount on there, was worth \$614 on one play, over
25 700 on another, \$1,500 on yet a third, and then \$1,700 on

1 the date of the hearing. What that means is a player can
2 walk up to this device, put a dollar in, push some
3 buttons, and walk away with over \$1,700. Put a dollar in,
4 and \$1,700, that's illegal gambling in the state of South
5 Carolina, Your Honor, plain and simple.

6 Now, gambling is exactly what SLED Special Agent
7 Ryan Wood testified that he did when he went in an
8 undercover capacity. He went to this location and gambled
9 and wagered and testified about that. He's the only
10 actual patron who actually saw this machine in its actual
11 operation that testified at the hearing. Both the defense
12 witnesses never saw a South Carolina patron do anything on
13 this device.

14 Special Agent Wood went three separate times in an
15 undercover capacity, gambled, wagered, witnessed others
16 doing the same, and his quote on page 2 of our brief
17 really encapsulates that. And we put so much of what his
18 experience was so that Your Honor could get an
19 understanding of what real world play is actually like and
20 what a player encountering is actually like, and so we did
21 that.

22 So the question then becomes: Is gambling and
23 making wagers on a device legal? That's what we're here
24 today about, Your Honor: A device.

25 The answer to that question is no. There's simply

1 no legitimate argument whatsoever that the South Carolina
2 legislature specifically intends to allow gambling on
3 gaming machines in South Carolina. We need to look no
4 further than the operative statute, 12-21-2710. It
5 clearly states: "It is unlawful for any person to keep on
6 his premises or operate or permit to be kept on his
7 premises or operated within this state any machine or
8 device licensed pursuant to 2720 and used for gambling."
9 Clear claim -- clear, plain, unambiguous language.

10 Won't belabor the licensing point. There was a
11 concession it was inadvertently unlicensed. It would be
12 illegal if it was unlicensed, so I won't touch that. I
13 thought the magistrate eloquently dispensed with that
14 argument and really that's not an issue in this case.

15 So it comes down to what is gambling. Gambling is
16 now and has always been defined as putting money into a
17 machine with a chance to win more money or any other thing
18 of value. It's really that simple. This is not that
19 complicated. I mean, decades of challenges, but the
20 answer is simple. Can I walk up, put money into a
21 machine, put a dollar in, and stand a chance to win more
22 money, like the 1,500 or \$1,700 that was available for
23 play in the evidence in this machine? If so, it's an
24 illegal gambling device.

25 And, of course, the evidence in this case

1 established that. There's no dispute that cash prizes
2 were available and paid out for winning.

3 So the question then becomes: Can a person still
4 illegally gamble even if it is a game of skill? That's
5 the question, which is, of course, the exact same question
6 posed to the Supreme Court in the *Chimento* case.

7 Now, of course -- so the question is: Can conduct
8 be gambling even if the conduct is predominantly skill?
9 Now, of course, that was live person Texas Hold'em,
10 analyzed under 16-19-40, but the question was the same:
11 Can you gamble even if skill predominates? That was the
12 question. And of course that's the same question that was
13 presented to Judge Deaton on this case.

14 And in following the Supreme Court's analysis -- in
15 following the Supreme Court's guidance, that answer is
16 yes. Conduct can still be illegal gambling even if is
17 predominated by skill. The Supreme Court ruled that the
18 statutory definition of gambling in South Carolina
19 includes games in which skill outweighs chance.

20 I'll say that again: The statutory definition of
21 gambling includes games in which skill outweighs chance.

22 The Court went on to establish that, when you're
23 making this analysis, whether it is gambling, it's not
24 dependent on the relative roles of chance or skill but on
25 whether there is money or something of value wagered on

1 the outcome. The takeaway is that, when analyzing the
2 statutory definition of gambling, don't look at the
3 dominant factor test. Look at whether or not money or
4 something of value is wagered on the outcome. That's the
5 law in South Carolina. It has been since 2012 when the
6 *Chimento* case came down.

7 So in following the binding jurisprudence -- and I
8 submit the Supreme Court's answer to the same question --
9 Judge Deaton merely applied and came up with the same
10 answer that the Supreme Court did. Can there be illegal
11 gambling even if skill predominates? The answer in
12 *Chimento* is yes. The answer today is yes. Same question,
13 same answer, same interpretation, which is, of course, the
14 specific word in the statute 12-21-2710 that were
15 analyzed.

16 Of course, in this case, there was a clear proof of
17 a wager. There's no dispute that the more you play, the
18 more you stand a chance to win. Never in dispute.
19 There's actually a button on the device, and Judge Deaton
20 hit this. It's a "raise your shot" button. You can use
21 that button specifically to facilitate 10 cents, 20 cents,
22 50 cents, a dollar, two dollars, and the amount that you
23 commit ultimately dictates the amount that you're capable
24 of winning. That's a wager in South Carolina.

25 And I think when you look at and you break down 2710

1 and you analyze it in the categorical context that exists,
2 you really highlight the understanding in that case, and I
3 think that would be very helpful here. I have actually
4 broken down the statute and have a copy. I have provided
5 a copy to opposing counsel. I'd like to hand it up to
6 Your Honor just as a breakdown of the statute in question,
7 which is 12-21-2710.

8 Obviously, there are eight separate categories in
9 2710: Vending machines, slot machines, video game
10 machines with a free play feature, devices operated by a
11 slot, which is deposit a coin or thing of value. But then
12 the two that really are at issue here today: No. 5 -- as
13 I've broken down the construction -- any machine or device
14 licensed pursuant to 2720 and used for gambling, and
15 No. 8, any other device pertaining to games of chance of
16 whatever may come.

17 There's, obviously, overlap between some of these
18 categories, but the fact that gambling machines are
19 prohibited separately from devices pertaining to games of
20 chance is really instructive on this issue. Separate
21 categories of illegal machines. And I think that is
22 indicative of the legislative intent on this issue.

23 Interestingly, the *Speedmaster* case that opposing
24 counsel cited sort of highlights that issue. In that
25 case, the Court said, Look, it doesn't have to be gambling

1 to be illegal. It's a device operated by a slot for the
2 play of poker. It's illegal because it is separately
3 defined and separately set forth in the statute, even if
4 there is no payout on the machine. That's illegal.
5 Separate category. So you look at the categories
6 separately.

7 I submit that the skill versus chance argument
8 really is most applicable -- and I would submit only
9 applicable to that device as pertaining to games of chance
10 or whatever name or kind, a catch-all category. That's
11 what I'll concede, a deep dive into the predominant factor
12 test applies and comes into play. However, after the
13 *Chimento* case, that skill-of-chance analysis doesn't
14 ultimately effect or doesn't rule the day in the context
15 of illegal gambling.

16 This ruling wasn't novel, Your Honor. This is the
17 same way that courts have analyzed this since that time.
18 And I can say that with supreme confidence because I have
19 been the lawyer for the State on gaming machine cases
20 since 2012. I have been doing it exclusively -- the
21 primary lawyer for the State since 2013. I have argued
22 the *Chimento* decision successfully throughout the state of
23 South Carolina: Anderson, Cherokee, Lexington, Oconee.
24 Courts everywhere have applied this precedent. I've got
25 all the memos and orders; I don't want to bog the Court

1 down with a bunch, but I'm happy to submit all of those.

2 But I've made the arguments, Your Honor. I've been
3 the lawyer since 2013 applying the *Chimento* decision
4 across the board.

5 At the end of the day, Judge Deaton didn't create
6 some new, novel test. He applied the law as the Supreme
7 Court has handed down the law, and he did so based on the
8 evidence presented, which is that players wager on the
9 outcome and the button on this device that facilitates
10 that wager. The more you commit, the more you stand to
11 win.

12 I think a footnote that Judge Deaton has touched on
13 also is important to analyze and discuss. In Footnote 3
14 on page 8, Judge Deaton notes that this game is played in
15 alcohol establishments; makes note that it's not probable
16 that players will exercise the dedication, patience, and
17 deductive analysis in order to play the game successfully.

18 The salient point that does require some discussion,
19 Your Honor: If you return to this machine, even though
20 it's going to be played by bar patrons -- let's not make
21 any mistake about where the market for this device is --
22 whether or not any of those players will play in the
23 mechanical way that the game designer can play is a very
24 different context.

25 In order to play this complex game successfully, you

1 have to read and memorize the rules, you have to memorize
2 the 30-minute-long pattern, and you have to wait, quite
3 candidly, and not shoot at any other dragon but these
4 three one-shot dragons that appear. Don't shoot at the
5 rainbow dragon with the dollar figures flying across the
6 screen. Again, Judge Deaton notes that it's just not
7 probable there.

8 South Carolina courts have long held that you look
9 behind the name and style and device, and you ascertain
10 its true character. You look at this device in actual,
11 practical operation. I think Judge Deaton appreciated
12 that. He notes in that same footnote that "while Dragon's
13 Ascent is a game that requires a high degree of skill to
14 master its complexities, the Court believes it is a game
15 designed to make money for the house, not the player in
16 the context of game play and brings with it the dire
17 concerns referenced by Chief Justice Toal in her
18 concurring opinion in the *Chimento* case."

19 And of course the magistrate judge is right. This
20 device is designed to make money. There'd be no market
21 for it if it wasn't going to make money out there. That
22 doesn't require some complex analysis. That's common
23 sense. No one is going to put a machine in their location
24 if it's not going to make money.

25 But, Your Honor, the problems that come with that --

1 the problem that comes with making money off of this
2 gambling and off of this conduct is what has led the
3 legislature to make gambling on machines illegal in the
4 state of South Carolina. And, of course, this issue
5 raised by Judge Deaton, it's the same issue that Chief
6 Justice Toal addressed in the *Chimento* concurring opinion.
7 I'd like to just quote her thing, because I do think it is
8 incredibly relevant to the decision today. As Chief
9 Justice Toal noted in *Chimento*, "Striking the language
10 would open the door wide to all heretofore illegal gaming
11 practices in this state, including video poker. Because
12 of this very real consequence, I'm concerned that striking
13 this critical language from the statute would beget, as
14 elucidated by the General Assembly in 1816 when amending
15 Section 16-19-40, the impoverishment of many people,
16 corruption of the morals and manners of youth, the
17 tendency which is vice, misery, and crime, as examples in
18 this state has abundantly proven. These dire consequences
19 resonant as much today as they did nearly 200 years ago.
20 I do not need to remind any person of the havoc wreaked
21 upon this state as a result of the pernicious practice of
22 video poker. Although there are other sound provisions
23 outlawing video poker, I am loathe to strike this critical
24 language from the general ban on gaming in the event that
25 it guts these provisions and, consequently, South

1 Carolina's longstanding prohibition against gambling."

2 Of course she's talking about 16-19-40, but that's
3 the same concern. That's what at stake. Your Honor,
4 ruling that this machine is illegal [verbatim], I submit,
5 would open the floodgates to gambling on machines in South
6 Carolina. All the industry has to do is build this
7 complex, one-shot functionality that the game designer can
8 play, and then gambling is legal. Patrons walk in, put a
9 dollar in for the chance to win \$1,700, and that becomes
10 legal.

11 Again, simply put, that is not the intent of the
12 legislature in the state of South Carolina. South
13 Carolina law goes very specifically to prohibit this
14 conduct, and our courts have long held, with this
15 dual-use, dual-functionality capability, can a machine be
16 both -- have legal games and illegal games and legal
17 functionality and illegal functionality.

18 Way back in 2000 in the *State vs. 192 Coin-Operated*
19 *Video Game Machines* case, the Supreme Court addressed this
20 issue head-on and noted that "the substance of the
21 appellant's argument is that, in the '60s, when the
22 predecessor statute to 2710 was enacted, slot machines
23 were readily identifiable. Today, with the advent of a
24 computer, a video game machine is simply a box containing
25 a computer which can be configured to play a variety of

1 games from poker to Pac-Man; therefore, the machine itself
2 should not be considered illegal."

3 The Court rejected that argument, finding that even
4 certain legal functionality on a machine cannot override
5 the illegal game play capability. The Court held the
6 plain language of the statute makes clear the
7 legislature's intent to outlaw mere possession of such
8 machines. The statute makes it unlawful for any person to
9 keep on its premises or operate certain gambling machines.

10 The Court went on to note that the Circuit Court
11 correctly ruled that possession of these machines is
12 illegal regardless of their intended use for operation.

13 Your Honor, taking that sentiment and applying it to
14 the matter today, I submit that, regardless of whether the
15 game designer can win something every time, the fact that
16 the evidence in this case, the fact that Special Agent
17 Wood and other South Carolina actual bar patrons can and
18 do gamble on this device makes it illegal.

19 The fact that players can wager, the fact that the
20 more you play, the more you stand to win makes it illegal.
21 The fact that a player can put a dollar in and walk away
22 with over \$1,700 makes it illegal.

23 Your Honor, at the end of the day, Judge Deaton
24 tried a good case. He viewed the evidence, heard the
25 testimony and the arguments, and he correctly applied the

1 applicable South Carolina law to the evidence presented.
2 As such, I ask that you uphold his opinion, I'd ask that
3 you not judicially legalize gambling on gaming machines in
4 South Carolina, and that you hold that the legislature is
5 the only entity in our constitutional system with a
6 separation of powers that can set that policy decision and
7 can legalize gambling on gaming machines, even ones where
8 skill predominates.

9 However, Your Honor, I submit, unless and until the
10 legislature amends 2710 and removes the specific
11 prohibition on machines or devices licensed pursuant to
12 2720 and used for gambling, that is the law in the state
13 of South Carolina. I ask that you uphold the magistrate's
14 finding and rule that this machine is illegal.

15 I would also incorporate the arguments made in my
16 brief. But we're talking about a machine, Your Honor.
17 We're not talking any other conduct. We're talking about
18 a device that so clearly fits within 12-21-2710,
19 restrictions of it, that I'm not even going to address the
20 other conduct because that's not even what we're talking
21 about. We're talking a machine used in violation of the
22 machine statute for illegal gambling.

23 Thank you.

24 THE COURT: All right.

25 Mr. Wilkins, anything in reply?

1 MR. WILKINS: Very briefly, Your Honor.

2 THE COURT: Yes, sir.

3 MR. WILKINS: I noted with interest, SLED did not
4 attempt to pull back from its position in its brief that
5 golf is illegal in South Carolina. But now that the
6 Supreme Court of our state or the United States Supreme
7 Court or the United States Court of Appeals overruled a
8 prior decision, the Court will explicitly say so and will
9 identify the name of the case or the doctrine of law that
10 is being overruled.

11 Almost 100 years in this state, gambling has been
12 defined by our state legislature and by all of our courts,
13 repeated by the Supreme Court in *West vs. Ward [verbatim]*,
14 written by the Chief Justice. It had three of elements:
15 Pay something to play a game based on chance to win
16 something. If that game is based on skill, it is not
17 gambling. And if skill predominates, as the magistrate in
18 this case held, it is not an illegal activity.

19 So what the magistrate court did was, in effect, to
20 overrule all of the expressed -- but he, in effect, said
21 it's already been done because *Chimento*, according to the
22 magistrate and to SLED, has thrown away the dominant past
23 factor test -- the three-prong test and substituted it
24 with two prongs. All he has to do is pay to play to win
25 something of value. Doesn't matter whether it's skill.

1 Doesn't matter whether it's a game of chance. Well, if
2 that were the case, then *Chimento* would have overruled
3 explicitly *Ward vs. West* and all these other cases.

4 Let me give you a few examples, Judge. This is our
5 Supreme Court talking. In *Proctor vs. Whitlark*, a recent
6 case, 2015, the decision involved whether a video poker
7 machine and the Unfair Trade Practices Act -- that was the
8 issue involved, though not of detail -- and our Supreme
9 Court said we overrule our prior decisions in *Gentry* and
10 *Johnson* to the extent they allow recovery under the UTPA.

11 Another Supreme Court decision, *Jordan vs. Borden*.
12 The Supreme Court stated that the traditional approach set
13 forth in a state -- in the *Stone* and *Selley* (ph) case that
14 allows the State to regulate price of goods charged,
15 anything that affects the public interest, that's the
16 traditional test. The modern test now gives great
17 deference to the legislative, judge, we now overrule our
18 prior cases and adopt the modern standard.

19 Another case, Judge -- and I'll be very brief -- "We
20 conclude the magistrate examination to seize machine in
21 12-21-2712," the seizure statute, "must include an
22 opportunity for the owner of the machine to be heard
23 concerning their legality. We overrule *State vs. Kerr*,
24 which gave the owner no such hearing."

25 In *Paradis vs. Charleston County Schools*, the

1 essential principle set forth in *Todd vs. Farm Bureau*
2 intended to address the need to create an overt act in
3 furtherance of the agreement and not special damages;
4 therefore, we overrule the *Todd* case and all cases relying
5 on *Todd* as precedent, such as the *Lee* case."

6 *State vs. Terrence*, the Supreme Court reversed the
7 Court of Appeals and held that the jury may not be
8 instructed to infer a defendant's knowledge of possession
9 of drugs at the property is found in the defendant's
10 control.

11 I say that, Judge, because, in *Chimento*, it was
12 going to do more than it did interpreting 16-19-40,
13 totally separate from anything that we are dealing with in
14 the magistrate's hearing. It would have said so.
15 *Chimento* never stated that it was overruling a single
16 prior decision. In fact, there was not even the slightest
17 hint that could be found anywhere in *Chimento* that it was
18 erasing 100 years of South Carolina jurisprudence. Most
19 telling.

20 Since *Chimento* was decided, Your Honor, in 2012, and
21 although the opportunity has presented itself on numerous
22 occasions over the past ten years, not a single court has
23 cited to *Chimento*, including our Supreme Court,
24 recognizes -- recognizing, much less applying across the
25 board, this new wagering test the magistrate held would

1 place the skill versus chance.

2 In *Richland County vs. Awde*, 2014 -- remember
3 *Chimento* was 2012 -- the Court affirmed the dominant
4 factor test and affirmed the magistrate court's finding
5 that Two Chess Challenge II devices were legal games of
6 skill and affirmed the magistrate's decision. The same
7 members of this court were the same members on the
8 *Chimento* court. No mention anywhere in this decision is
9 *Chimento*.

10 The Court of Appeals, in the year 2016, the
11 Department -- talking about the Department of Revenue --
12 showed that machines contains game of chance in violation
13 of 12-21-2710. No mention whatsoever of *Chimento*.

14 In our circuit courts, *Smith vs. SLED*, 2013, "The
15 apparatus is a gambling device where there is anything of
16 value to be won or lost as a result of chance." It did
17 cite to *Chimento* but only for the limited issue of whether
18 or not something is unconstitutional. Nothing to do with
19 the Dominant Factor Test. The Court applied the Dominant
20 Factor Test. In that case, the Dominant Factor Test was
21 advocated by SLED and affirmed the magistrate's order that
22 the device was illegal pursuant to 12-21-2710 because it
23 was predominantly a game of chance.

24 And our administrative law courts in 2020: "There
25 are three elements of gambling," our courts said,

1 "consideration, chance, and prize." Well, that's clearly
2 present in the device for a price and, based upon chance,
3 offers a monetary or merchandise reward to the successful
4 player. No mention of *Chimento* by this Court.

5 Another administrative law court judge was -- in
6 2021 -- it said, "Games of chance are prohibited by South
7 Carolina Code 12-21-27." No mention of *Chimento*.

8 And our Attorney General, in 2017, said, "South
9 Carolina gambling laws prohibit games of chance." No
10 mention of *Chimento*.

11 Followed by another South Carolina Attorney
12 General's opinion, "In South Carolina, the three elements
13 are offering a prize, payment of some consideration, with
14 the winner determined by chance." No mention of *Chimento*.

15 Thank you, Your Honor.

16 THE COURT: All right. Anything further from SLED?

17 MR. WHITSETT: I can argue all day, Your Honor,
18 but...

19 THE COURT: I understand. All right. Thank y'all
20 so very much for being brief. I'll take it under
21 advisement, but you'll have an answer by Friday morning.

22 (At 1:50 p.m., the above hearing concluded.)
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CERTIFICATE OF COURT REPORTER

State of South Carolina)
County of Charleston)

RE: 1 Dragon's Ascent v SLED

I, Bobbi J. Fisher, Registered Professional Reporter (RPR) and Official Court Reporter III for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case in the *Court of Common Pleas for Berkeley County, South Carolina* (held in Charleston County) on the *12th of December, 2022*.

Submitted: *June 1, 2023*

____/s/ Bobbi Fisher, RPR____

Bobbi J. Fisher, RPR

Official Court Reporter III

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DEFENDANT'S EVIDENCE LIST

1. Office of the Attorney General for the District of Columbia Opinion (with original affidavit)

Nick Farley

2. *Curriculum vitae*
3. Expert report (with appendices - including Help instructions)

Brock Smith

4. *Curriculum vitae*
5. Redemption tickets
6. Photo: Dragon's Ascent console
7. Photo: Ticket Redemption Terminal (TRT)



DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
2000 14th Street, N.W.
Washington, D.C. 20009

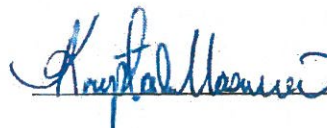
CERTIFICATE OF RECORD

I, Lamont Mahone, Sr., Records Officer, Alcoholic Beverage Regulation Administration (ABRA) for the District of Columbia, on this 22 day of September, 2021, do hereby certify that I am the official custodian of the ABRA records and that the seven (7) page Memorandum dated October 25, 2019 appended hereto is a true copy of a document comprising a portion of ABRA's records as it relates to the matter of Riot Act, LLC, t/a Penn Social, ABRA License No. 086808.



Lamont Mahone, Sr.

Subscribed and sworn to before me this 22 day of September, 2021.



Notary Public DC



GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General




ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

MEMORANDUM

TO: Jonathan Berman
Assistant General Counsel
Alcoholic Beverage Regulation Administration

FROM: Brian K. Flowers 
Deputy Attorney General
Legal Counsel Division

DATE: October 25, 2019

SUBJECT: Legal Advice Concerning Whether “Dragon’s Ascent” Machines are
Gambling Devices
(AL-19-696)

This memorandum responds to your request that this Office provide legal advice to the Alcoholic Beverage Regulation Administration (“ABRA”) on whether the Dragon’s Ascent gaming machine is a gambling device under District and federal law. The Dragon’s Ascent gaming machine contains no element of chance, and is therefore not a gambling device.

Background

Penn Social LLC, self-described as a “sports bar, arcade, & event venue” in the District,¹ and a holder of an ABRA license, has petitioned ABRA for approval to install Dragon’s Ascent gaming machines, created by Pace-O-Matic, Inc. ABRA held a public hearing on the petition on October 9, 2019, at which representatives for Penn Social and Pace-O-Matic were present. As described to ABRA,² and stated and demonstrated at the public hearing, players insert cash up to \$20 into the Dragon’s Ascent machine, and attempt to capture dragons by shooting them. Players can earn money based on how selectively and effectively they shoot the dragons. As described in screen disclosures to the game:

Each shot costs the amount in pennies displayed in the center of the gun turret.

¹ Penn Social, <https://www.pennsocialdc.com/> (last visited Oct. 18, 2019).

² Letter from Stephen J. O’Brien, counsel, Penn Social LLC, to ABRA (Sept. 6, 2019).

You can increase the amount spent on each shot using the Power Up button. . . .
Award values for a captured dragon are always a multiple of the total amount spent to capture that dragon. This means you can change your shot cost value at any time during play.

....

The bigger and more powerful the dragon, the more he will be worth, but the harder he will be to capture (meaning, more shots must hit him).
Capturing a dragon rewards you credit value. The minimum and maximum award possible is displayed on the accompanying award chart.
Some dragons have special powers and provide special rewards, like Gold Rush, Free Shots or Super Multipliers.

....

Your gun and the magic shots are constantly changing colors through a preset sequence. The dragons are presented in various colors that match a portion of the color cycle. If your shot is the same color as the dragon it hits, you maximize a special Color Match Bonus Award. The more shots that match, the higher the bonus when the dragon is captured. . . .
The power of your shots can get a boost from the Shot Power vial to the left of the gun turret. When the vial is full, the shot has the greatest power. Combine Shot Power with Color Matching for the biggest awards and the least number of shots!³

Essentially, players pay for a reservoir of shots to shoot dragons, then win money depending on how effectively they shoot the dragons among fourteen variables, such as color, shot power, and multipliers.⁴ The game consists of seven fixed scenarios, which repeat and can be learned by an attentive player. A player can win back more money than the player put in. Dragon's Ascent does not utilize a random number generator or a compensating algorithm to change the odds of winning; the sequences and rewards are always fixed, and there is no element of chance in determining the player's reward per shot. Players may cash out at any time and receive the cash value of their credits from the establishment operator. The game comes in smaller two-person cabinets or larger eight-person tables.

Counsel for Penn Social represented at the ABRA hearing that it would have a number of safeguards in place to ensure the proper and controlled operation of the machines in the District.

³ Letter from Thomas F. Fricke, attorney, to B. Greg Cline, General Counsel, Pace-O-Matic Inc. 7-8 (March 27, 2019) (attached as part of the Letter from Stephen J. O'Brien, *supra* note 2).

⁴ An expert synopsis described the Dragon's Ascent variables as follows:

The *Cross-Fire Skill Dragon Master System* contains fourteen features that the participant must manage to score and win effectively. They are as follows: (1) Aim and Shoot; (2) Lock-On; (3) Color Cycles; (4) Shot Power (A Volatility Enhancement Script); (5) "Health Power"; (6) the "Super Multiplier"; (7) the "Follow Me" target; (8) the "Treasure Chest" target; (9) the "Gold Rush" target; (10) the "Shadow Dragon" obstacle target; (11) the missed shot return of credits; (12) the "Stolen Capture" return of credits; (13) the return of credits when a target leaves the playfield without capture; and (14) the "Free Shot" feature.

Letter from Nick Farley, President, Nick Farley & Assocs., to Thomas F. Fricke, attorney 2-3 (April 19, 2019) (attached as part of the Letter from Stephen J. O'Brien, *supra* note 2).

Penn Social requires persons to be 21 years of age or older to be admitted to its venue.⁵ Pace-O-Matic would have a dedicated enforcement team of former Metropolitan Police Department officers to ensure that the machines are licensed and operating properly, and an application to scan unique codes on each device to immediately determine whether the device is licensed. Each institution would be limited to a total of 3 machines or 16 playable stations.

Given that players can win back more money than they put in, Penn Social and Pace-O-Matic were questioned as to how they would make any money off of the game. Counsel for Penn Social responded that the games were profitable based on volume; the games themselves made some money but not a lot, and the establishments operating the games saw increases of approximately 20% in food and beverage spending with the games on site. Counsel further stated that the games returned between 60 to 95% of the money spent back to players in winnings.

Pace-O-Matic recently had games approved for use by Virginia and Pennsylvania authorities, on the grounds that they were predominantly games of skill.⁶ However, the Dragon's Ascent game presented is distinct from those games, and purports to be a 100% skill game, with no element of chance. According to counsel for Penn Social, Dragon's Ascent machines have been approved by the relevant authorities and are operating in Florida, Nebraska, and Texas, and have been approved for use in Hawaii and Kansas.

At issue in the ABRA hearing were: 1) whether installing the Dragon's Ascent game at Penn Social would substantially change the nature of the operation of the licensed establishment under D.C. Official Code § 25-762; and 2) whether the Dragon's Ascent game constitutes an illegal gambling device under District and federal law. We address the question of whether the Dragon's Ascent game is an illegal gambling device.

Analysis

I. Gambling Laws in the District

Gambling devices are forbidden in the District by both a local act of Congress⁷ and the federal Johnson Act.⁸ D.C. Official Code § 22-1704 provides that "[w]hoever shall in the District set up or keep . . . any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, . . . shall be punished by

⁵ In instances where Penn Social was rented out for special events involving persons under the age of 21, Penn Social represented that it would cover up the machines and not allow them to be operated.

⁶ See *In re Pace-O-Matic, Inc. Equipment*, No. M.D. 965-2013, 2014 Pa. Dist. & Cnty. Dec. LEXIS 3203 (Beaver Cnty., Pa. Ct. Common Pleas Dec. 13, 2014); Letter from Thomas W. Kirby, Deputy Chief, Department of Alcoholic Beverage Control, Commonwealth of Va., to Jeffrey L. McGinness, Pace-O-Matic (July 7, 2017). But see Kimberly Pierceall, *Tic-Tac-No? Queen of Virginia games banned in Charlottesville*, *The Virginian-Pilot* (June 18, 2019, 11:30 AM), https://www.pilotonline.com/business/article_ddbef50-8ee3-11e9-b71d-d784feab79fb.html (Charlottesville Commonwealth Attorney declaring Pace-O-Matic games to be illegal gambling devices).

⁷ An Act To establish a code of law for the District of Columbia, effective March 3, 1901 (31 Stat. 1331; D.C. Official Code § 22-1704 *et seq.*).

⁸ An Act To Prohibit transportation of gambling devices in interstate and foreign commerce, effective January 2, 1951 (64 Stat. 1134; 15 U.S.C. § 1171 *et seq.*).

imprisonment . . . and . . . may be fined.” “Gambling device” is not defined, although “gaming table” is. D.C. Official Code § 22-1707 provides that “[a]ll games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of §§ 22-1704 to 22-1706; and the courts shall construe said sections liberally, so as to prevent the mischief intended to be guarded against.”

In *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944), the court expounded upon the intent and elements of the prohibition on gambling devices in the District:

[T]he purpose of Congress in the enactment of the local law was to make criminal the use of all contrivances by which money or property is bet or wagered or risked on the chance of some material reward. Hence it is obvious that a crap table, a dice table, a horse race device, keno, a lottery, book making, or a six-wheel or a chuck-a-luck table or a faro table, at which money is bet and won or lost, are all gambling devices as are also many other like schemes or devices. But in all the primary consideration in this jurisdiction is whether the machine or device, whatever its scope or nature, is the inducing cause to gambling for money or property. To gamble, as is well known, is to risk one's money or other property upon an event, chance or contingency in the hope of the realization of gain, and the test as to whether a particular machine combination constitutes a gambling device is . . . whether it is adapted, devised and designed for the purpose of playing any game of chance for money or property. The elements, chance and money or property, are therefore fundamental ingredients.

Id. at 98. Although “gambling device” is not expressly defined, *Washington Coin* makes clear that the test in determining whether something is a gambling device is whether it is designed for the purpose of playing a game of chance for money or property.⁹

In *Boosalis v. Crawford*, 99 F.2d 374 (D.C. Cir. 1938), the court established the standard for when a game is considered a game of chance in the context of “claw machines.” Claw machine players could move the claw over the top of prizes, the machine would then lower the claw, and the players would get the prize if the claw picked it up. *Id.* at 375-76. The lower court had found that “in respect of a player . . . , except to the extent that he could, by turning the locator-handle, suspend the claw in the vicinity of a desired article, the operation of the machine was beyond his control.” *Id.* at 376. The court held that even on the assumption that “skill played a part in suspending the claw in the vicinity of a desired article, . . . on the whole of the operation of the machines . . . , chance predominated over skill or was present in such manner as to thwart the exercise of skill. Under such facts, the device operates as a game of chance.” *Id.* The test established in *Boosalis* for whether a game is a game of chance is thus whether chance predominates over skill, or thwarts the exercise of skill.

⁹ See also *Nat'l Conference on Legalizing Lotteries v. Farley*, 96 F.2d 861, 863 (D.C. Cir. 1938) (“[A] lottery is composed of three elements: Prize, consideration, and chance. The first two may exist in a game of skill; the last always converts the contest into a lottery or a gamble. The question then is whether the winning of the prizes under the instant scheme depends upon chance.”).

In addition to local District laws, the federal Johnson Act bars the possession or use of gambling devices in the District. The Johnson Act provides that “[i]t shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia.” 15 U.S.C. § 1175(a). It defines “gambling device” as “any other machine or mechanical device . . . designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property.” 15 U.S.C. § 1171(a)(2).¹⁰ “In the District of Columbia, . . . the Johnson Act makes it unlawful to ‘possess’ or ‘use’ any ‘gambling device.’” *Cabazon Band of Mission Indians v. Nat’l Indian Gaming Comm’n*, 14 F.3d 633, 635 n.3 (D.C. Cir. 1994); see also *Brizill v. D.C. Bd. of Elections & Ethics*, 911 A.2d 1212, 1215 (D.C. 2006) (“[S]ection 1175 of the Johnson Act . . . clearly applies to the District of Columbia.”).

In construing whether something is a gambling device under the Johnson Act, the court in *United States v. 24 Digger Merch. Machines*, 202 F.2d 647 (8th Cir. 1953), stated that “comparison of the elements of chance and skill is immaterial. The statute refers to a machine so designated that it will deliver property ‘as the result of the application of an element of chance’. Where a substantial element of chance is involved, . . . the fact that skill in operating the particular machine is helpful in attaining the end sought does not take the machine out of the type defined by the statute.” *Id.* at 650-51. Under the Johnson Act, every gaming machine whose outcome involves a substantial element of chance is a gambling device, regardless of the degree of skill required to win.

In summary, a device is a gambling device that violates D.C. Official Code § 22-1704 if chance predominates over skill or thwarts the exercise of skill, and is a gambling device that violates the Johnson Act if it relies on a substantial element of chance. These standards overlap significantly, and have been used in the same contexts;¹¹ a game must satisfy both to be legal in the District.

II. Cases Interpreting Other Games

In a previous memorandum, we surveyed recent court decisions on what constituted a game of skill.¹² We briefly reiterate some of the relevant holdings discussed in that memorandum, but note that the Dragon’s Ascent game is qualitatively different from those games.

In *Pace-O-Matic, Inc. v. N.Y. State Liquor Auth.*, 72 A.D.3d 1144 (N.Y. 2010), the court considered a two-stage game where players had one second to select a symbol to solve a puzzle

¹⁰ At least since the enactment of the Indian Gaming Regulatory Act, approved October 17, 1988 (102 Stat. 2467; 25 U.S.C. § 2701 *et seq.*) (“IGRA”), the definition of “gambling device” in the Johnson Act includes electronic versions of games of chance. See 25 C.F.R. § 502.8 (“*Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game”); *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) (“[C]omplete, self-contained electronic or mechanical facsimiles of a game of chance . . . may indeed be forbidden by the Johnson Act after the enactment of IGRA” (citing 25 C.F.R. § 502.8)); *Cabazon Band of Mission Indians v. Nat’l Indian Gaming Comm’n*, 827 F. Supp. 26, 31 (D.D.C. 1993) (“[I]t is plainly evident that IGRA’s ‘facsimiles’ are the Johnson Act’s ‘gambling devices.’”).

¹¹ See, e.g., *United States v. 10, More or Less, Digger Machines*, 109 F. Supp. 825 (E.D. Mo. 1952) (applying the *Boosalis* analysis to the Johnson Act).

¹² Memorandum from Arthur J. Parker, Acting Deputy Attorney General, Legal Counsel Division, Office of the Attorney General, to Jonathan Berman, Assistant General Counsel, ABRA (Feb. 14, 2019).

and win 104% of the money deposited, and then played a second puzzle-solving stage where the prizes were randomly determined. *Id.* at 1144-45. The court found that it was a game of chance, as “[w]hile solving the puzzle in any phase may require skill, the outcome in the post-Moxie phase—which includes the amount of the prize—‘depends in a material degree upon an element of chance.’ The prize is selected at random by the machine . . .” *Id.* at 1146.

In *Banilla Games, Inc. v. Iowa Dep’t of Inspections & Appeals*, 919 N.W.2d 6 (Iowa 2018), the court addressed nudge-style games where three reels are spun in a pattern determined by the machine, and players had to “nudge” one of the wheels up or down to complete the pattern. *Id.* at 10. The devices had a payout structure that could be set between 92% and 98%, but positive prizes were only available in less than 1/3 of the outcomes, and a player with perfect skill would still steadily lose at least 2% of the time. *Id.* The court held that the games were gambling devices, because “whether a player wins on the Superior Skill games relies primarily more on chance than on skill or knowledge,” and even “with perfect skill and knowledge, a player cannot win every time.” *Id.* at 18.¹³

In contrast, in *Am. Amusements Co. v. Neb. Dep’t of Revenue*, 807 N.W.2d 492 (Neb. 2011), the court upheld a version of a video “tic-tac-toe” game¹⁴ on the grounds that it required skill and “a winning combination is possible with respect to each puzzle.” *Id.* at 495. In that case, players had a short amount of time to solve the puzzle, and the court upheld a finding that “the puzzles were not presented so fast that a player could not exercise skill in the selection of the puzzle to be played,” and thus “[t]he selection of the puzzle is thus determined by player skill, not by chance.” *Id.* at 503-04. The state also argued that the game was “determined by chance because of the infrequent presentation of winning puzzles,” where “[w]inning’ in this context means a puzzle that pays the player more credits than the player puts at risk.” *Id.* at 504. The court rejected that argument, finding that although “[t]he odds of coming away with more money than a player risks on a puzzle are remote”¹⁵ and “a player must exert considerable patience while waiting for the ‘winning’ puzzles to appear,” “[n]evertheless . . . Bankshot is more controlled by the player than not, and thus is predominantly a game of skill.” *Id.*

Generalizing from these cases, even if a game involves some element of skill, it will be found to be a gambling device if the prizes are determined by elements of chance. If it is possible for a perfectly skilled player to win every time, then the game is not a gambling device.

III. Conclusions

The test for whether something is a gambling device under D.C. Official Code § 22-1704 as stated in *Boosalis* is whether “chance predominated over skill or was present in such manner as to thwart the exercise of skill.” 99 F.2d at 376. The interpretation of the Johnson Act in 24

¹³ See also *Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 762 S.E.2d 666, 686 (N.C. Ct. App. 2014 (Ervin, J., dissenting), *rev’d*, 773 S.E.2d 55 (N.C. 2015) (adopting dissenting opinion)) (“The machines and equipment at issue here only permitted a predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has been reached will be unable to win a prize no matter how much skill or dexterity he or she exhibits.”).

¹⁴ See generally *Am. Amusements*, 807 N.W. 2d at 495 (describing the tic-tac-toe game).

¹⁵ “Of the 10,325 puzzles in Table A, 1,187 pay more than the credits put at risk on the puzzle. That number is 155 in Table B and 12 in Table C.” *Id.* at 504.

Digger Merch. Machines, although it is an Eighth Circuit case and not directly binding on the District, held that “comparison of the elements of chance and skill is immaterial” and that a device is a gambling device whenever “a substantial element of chance is involved.” 202 F.2d at 650-51.

According to the information presented to ABRA and the representations made at the hearing, there is no element of chance anywhere in the Dragon’s Ascent game. Rather, the game appears to make money by layering a complex series of variables and requiring more patience than the average game player is likely to demonstrate. Still, it is possible for a player to “win” or make money every single time, if the player is dedicated and patient enough. No part of the outcome of Dragon’s Ascent is dependent on chance; the player’s reward for each shot is a direct factor of the player’s choices and the fixed game algorithm. As stated in *Washington Coin*, “the elements, chance and money or property, are therefore fundamental ingredients” of a gambling device, 142 F.2d at 98, and the element of chance is not present in the Dragon’s Ascent game. Accordingly, the Dragon’s Ascent game, as described and presented to ABRA, is not a gambling device in violation of D.C. Official Code § 22-1704 or the Johnson Act.

If you have any questions about this memorandum, please contact Matt James, Assistant Attorney General, Legal Counsel Division, at 724-5558, or me at 724-5565.

BKF/mdj

CURRICULUM VITAE

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SUMMARY OF QUALIFICATIONS

- Graduate of *Stevens Institute of Technology*, Hoboken, NJ with a Bachelor of Engineering Degree in *Electrical Engineering and Computer Science*.
 - Over 30 years experience in the test and evaluation of gaming and electronic devices.
 - President and founder of *Nick Farley & Associates, Inc.* dba **Eclipse Compliance Testing**, an independent regulatory compliance testing laboratory.
 - Proficient in several computer programming languages and operating systems including:
 - Windows-based operating systems, including Windows 95/98/2000/ME and Windows NT.
 - MS Office suite, including *Word, Excel, Power Point, Project, Outlook* and *Access*.
 - MS-DOS and UNIX-based operating systems.
 - Basic, C, C++, Pascal and some Assembly-level programming languages.
 - Qualified to testify as an *Expert Witness* of electronic gaming devices.
-

EXPERIENCE

Nick Farley & Associates dba Eclipse Compliance Testing, Solon, OH 2000 – Present
President

Technical consulting organization and compliance testing laboratory serving law enforcement, Tribal and government regulatory agencies, as well as regulated casino gaming device manufacturers with regard to device classification and compliance assurance. Responsibilities include the following:

- All facets of test, review and evaluation of electronic gaming devices to assist law enforcement and government agencies with device classification.
- Review of electronic devices in accordance with the Indian Gaming Regulatory Act and the Johnson Act.
- Author reports to agencies regarding technical details and operation of reviewed devices.
- Provide Expert Testimony to assist in litigation of alleged illegal gambling devices.
- Regulatory Compliance Assurance assistance to licensed gaming device manufacturers.

Gaming Laboratories International, Inc., Toms River, NJ 1991 – 2000

Engineering consulting company serving the needs of the casino gaming, vending, and amusement industries by testing electronic devices for compliance with established rules and regulations. Positions held with this organization during my tenure include the following:

Executive Director – Special Projects Division *(1998 - 2000)*

Responsible for running the Special Projects Division, a division devoted to creating new business opportunities. Report directly to Vice President and President of this privately owned company.

- Conducted independent and impartial evaluations of unclassified gaming/redemption devices under dispute between Government Agencies (Federal, State and Local) and various Native American Tribes.
- Served as Expert Witness to the State of Florida in a case regarding the dispute of skill versus chance in an electronic gaming device.
- Established and implemented procedures to review and evaluate Wide Area Progressive Systems for functionality and integrity.
- Created comprehensive test procedures to fully evaluate three separate communication protocols utilized by Coca-Cola vending machines. Test parameters included internal communication with peripheral devices as well as external communication functionality.

Director - Engineering & Testing Methods (1996 – 1998)
Manager - Casino Division / Manager - International Business (1993 – 1996)
Test Engineer (1991 – 1993)

Responsible for developing a global presence for the company, inspecting gaming devices in new casinos prior to opening, and the evaluation of all types of electronic gaming devices and related systems.

- Developed internationally recognized industry standard of comprehensive, common sense test procedures to assure functional integrity and regulatory compliance for individual gaming devices in the laboratory.
- Developed and maintained strong relationships with clients and international staff by building rapport.
- Designed and implemented benchmark procedures for effectively determining if gaming system and device software/firmware had been approved for jurisdictional use and were configured in accordance with regulatory requirements. Special emphasis was placed upon the communication between the on-line slot monitoring systems and individual devices within the casino. *Personally implemented these procedures in hundreds of casinos worldwide.*

New Jersey Division of Gaming Enforcement, Atlantic City, NJ 1987 - 1991

Test Engineer

Responsible for the test and evaluation of electronic gaming devices and progressive jackpot systems used in Atlantic City Casinos.

- Developed comprehensive test procedures to assure integrity and accuracy in gaming devices and related systems, thus creating an industry standard for compliance testing.

EDUCATION

Stevens Institute of Technology, Hoboken, NJ Graduated May 1987

Bachelor of Engineering Degree in Electrical Engineering and Computer Science.

Continuing Education and Personal Development 1991 - Present

Numerous professional and personal development courses in Communication, Customer Service and Management/Leadership including the following:

- *Exceptional Customer Service*
- *Management Problems of the Technical Person in a Leadership Role*
- *How to Be a Great Communicator*

ACHIEVEMENTS

- 2010 recipient of Warrior's Award from the Oklahoma Indian Gaming Association for Lifetime Achievement as a Champion in the cause of Oklahoma Indian Gaming
- Frequent speaker and presenter at gaming industry trade shows and conferences
- Contributor to several articles featured in *Casino Enterprise Management* magazine
- Featured in *RePlay Magazine* in July 2002.
- Interviewed by *Bingo Business* magazine and quoted in Summer 2000 issue.
- Featured in *Casino Journal's National Gaming Summary* in August 2000.
- Served as expert witness in many cases regarding classification determination of electronic video devices.
- Member of *International Who's Who of Professional Management*.
- Successfully developed new business opportunities from lead establishment through contract negotiations.
- Traveled extensively, domestically and internationally, sharing my expertise with gaming operations and gaming test facilities throughout the world.

PROFESSIONAL AFFILIATIONS

- North American Gaming Regulators Association
- Oklahoma Tribal Gaming Regulators Association
- National Indian Gaming Association
- International Association of Amusement Parks and Attractions (IAAPA)



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December 9, 2021

Mr. Richard L. Tapp, Jr.
205 King Street, Suite 400
Charleston, South Carolina 29401

Re: Review and analysis of the *Dragon's Ascent System v.DA1 105.02 GEN 12399*.

Dear Mr. Tapp:

By request received of counsel, **Nick Farley & Associates, Inc.** has conducted a review and examination of the *Dragon's Ascent System vDA1 105.02 GEN 12399* ("*Dragon's Ascent*"). Our review and examination has been undertaken on behalf of Mr. Richard L. Tapp, Jr. of Nexsen Pruet, LLC Attorneys and Counselors at Law for the benefit of SC Games of Skill, LLC., intended for use in the State of South Carolina. This document will be divided into sections representing the various stages of review and analysis conducted.

Section I – Purpose and Company Background

Nick Farley & Associates, Inc. has been retained by counsel to conduct an extensive technical review of the *Dragon's Ascent System vDA1 105.02 GEN 12399*. **Nick Farley & Associates, Inc.** d/b/a **eclipse Compliance Testing** is an independent testing laboratory in the business of providing engineering evaluations of electronic games, including gaming devices intended for use under laws and regulations of licensed gaming jurisdictions. Such laws and regulations frequently require (1) independent laboratory certification of compliance with the applicable technical standards and other regulations of the gaming commission or agency; and (2) formal acceptance by the regulator of the independent testing laboratory that provides the certification as an engineering report and opinion.

Nick Farley & Associates, Inc. includes a team of qualified engineers, well versed in the review of electronic systems in the gaming and promotional industries, as is evidenced by our company biography which has been attached to this report as Appendix A. In addition to the attached company biography, **Nick Farley & Associates, Inc.** is presently accepted by the licensed gaming regulators of two hundred fifty-one U.S. gaming jurisdictions and eight licensed gaming regulators of foreign jurisdictions. A list of the governmental regulators that have formally accepted **Nick Farley & Associates, Inc.** as an authorized independent testing laboratory has also been included.

PROPRIETARY AND CONFIDENTIAL

Nick Farley & Associates

www.nfa777.com

Section II – System Components

The *Dragon's Ascent System v.DA1 105.02 GEN 12399* reviewed consisted of the following components:

Software Component	Software Version
Dragon's Ascent	DA1 105.02 GEN 12399

The *Dragon's Ascent* software is Linux based program, provides an interface by which customers of the host venue may participate in the game using the provided player controls.

Hardware Component(s)	Hardware Model
Dragon's Ascent Cabinet	DualPlay

The *Dragon's Ascent System v.DA1 105.02 GEN 12399* software was reviewed on the submitted *DualPlay* cabinet. However, the software can also be installed and operated on *SinglePlay* cabinets as well.

DualPlay Cabinet

The *DualPlay* cabinet is a stand-alone machine, which features two (2) player stations and a 32" monitor, which is used as a horizontal video playfield. Players insert money into the *DualPlay* cabinet through a bill acceptor located on the front side of each of the two (2) player stations. The bill acceptors accept U.S. notes of varying denominations. Bills inserted are displayed on the video screen as credits available for game play purchase at the rate of one hundred credits per dollar inserted.

The *DualPlay* cabinet submitted for review with the *Dragon's Ascent System v.DA1 105.02 GEN 12399* software contains the following hardware components:

- Centralized PC running a Linux based operating system.
- 32" 4K Ultra High Definition (UHD) LCD
- Two Bill Acceptors (one for each player station)
- Two Ticket Printers (one for each player station)
- Two sets of player controls (one set for each player station). Please refer to Section III – General Game Play Operation for more information on the player controls.

The *DualPlay* cabinet, which runs the *Dragon's Ascent* software, supports USB communications for all peripherals, including the following:

- DRAX Command Channel (Local input/output board);
- Dual RS232 Adapter;
- Bill Acceptors;
- Ticket Printers;
- Joysticks;
- Audio; and
- Arduino (LED Controller).

Section III – General Game Play Operation

To enable participation in *Dragon's Ascent*, the player must first insert currency into one of the bill acceptors of an available player station. As configured, the player must then manually confirm (using the controls) his/her age as being eighteen years or older. If the player confirms that they are not eighteen years or older, the currency inserted will be rejected and returned to the player. Currency inserted will be established as credits to be used in game play at the rate of 100 credits per dollar. The player must then select the desired quantity of credits that will be expended for a single shot at a dragon.

There is no time limit on participation in *Dragon's Ascent*. Based on the number of credits established on the game by the player, the player is able to make as many, or as few, plays as desired and at any time desired. When the player leaves the game, the established credits remaining on the player station being used, are credited to the player on demand, in the form of a redeemable ticket. A single play of the game begins when the player initiates a shot at a dragon displayed in the playfield, and ends when the shot either hits a dragon or fails to hit any dragon and exits the playfield.

The player utilizes the provided controls and available in-game turret to Aim and Fire at various dragons that appear on the playfield, until they are captured. The dragons that are captured will reward the player with an associated reward range, which will be applied to the number of credits used on the shot that captured the dragon and the result then added to the player's credit account. As configured, the levels of credits that the player may expend per shot are 10; 20; 50; 100; and 200.

Integral with *Dragon's Ascent* is a Help screen, ("Appendix B") which is a fully illustrated explanation of each of the means of player control of game play outcomes. Activating the *Help* screen displays the instructions, which explains *Dragon's Ascent*, including game play, in-game features, and game rules. The *Help* screen also provides a Reward Chart. The Reward Chart within the *Help* screen displays the ranges of possible rewards for a variety of dragons. At each player station, the player can launch and review the instructions at any time.

Player Controls

Each player station of *Dragon's Ascent* provides several controls that are used by the player to interact with the game. The player controls are listed below:

- Joystick – this control is used to select and adjust the single-plane aiming direction of the player's turret.
- Raise Shot Cost button – this control is used to select the number of credits to be expended by the next shot to be made by the player's turret.
- Shoot button – this control is the player's trigger. It is used to fire shots at dragons that appear on the playfield. The player is able to press and hold the button to initiate an auto shoot feature, or may press the button each time to fire a single shot each time the button is pressed.
- Lock-On / Menu button – this control is used to switch between Aim and Fire and Lock-On modes. Please note that these modes are described below within Section IV – Game Play Features.
- Ticket button – this control is used to print a redeemable ticket, which the player may use to redeem for cash from the host venue or ticket redemption terminal.
- Shot Power Vials - Also included in the control array at each player position is a video graphic representation of five (5) small vials of fluid. Each vial is associated with a specific group of dragons ranging from 1-5 starting from left to right. The groups of dragons associated with each vial can be reviewed via the *Help* screen. It is an information display necessary to enable the player to time shots for optimum effect utilizing the Shot Power feature described below. Shot Power vials contain varying levels of colored fluid indicating the power of a shot at each group of dragons. The Shot Power of each color is identified on the Help screen.

Please Note: For images of the groups of dragons available on the *Dragon's Ascent* software, please refer to Appendix B.

At any time, the player can choose to redeem credits that are currently associated with the player station being used. The credits that are on the player station include credits that have been established by the player (i.e. inserted cash) and credits that have been accrued through game play (i.e. rewards for successful play). Credits from both sources are commingled on the player station being used. To redeem their credits, the player must use the Ticket button, which will print a ticket containing the player's credit amount.

Section IV – Game Play Features

The *Dragon's Ascent System v. DA1 105.02 GEN 12399* contains various features that the player can utilize to control the score achieved while playing *Dragon's Ascent*. *Nick Farley & Associates, Inc.* has evaluated each of the features, which have been described below:

PLAYER CONTROLS

Aim and Fire

The player can select the Aim and Fire mode for the player's turret. The *Aim and Fire* mode requires the player to utilize the provided *Joystick* and *Shoot* button to aim and fire the turret at the dragons appearing on the playfield.

Dragon's Ascent allows for the player to either press the *Shoot* button each time they desire to fire a single shot or alternatively, press and hold the *Shoot* button to initiate an auto fire feature, which will fire at a slower rate of speed than the maximum rate possible by rapidly pressing the *Shoot* button to fire individual shots.

Lock-On

Alternative to the Aim and Fire mode, the player can select the Lock-On mode for the player's turret. The player can readily change back and forth between the Aim and Fire and Lock-On modes. The *Lock-On* mode provides the player with an auto-lock feature, which provides options to select a single dragon that is currently on the video playfield. The *Lock-On* turret mode is capable of locking onto, and focusing on, a single dragon. The player must utilize the joystick to scroll through the available dragons and choose the dragon to be targeted. When a dragon is targeted by the player, the *Lock-On* mode will display a dotted line that is drawn to the dragon on the playfield, which indicates the dragon that has been targeted.

The dragons available to be shot while utilizing the *Lock-On* turret mode are limited to the dragons that are currently appearing on the playfield. While utilizing the *Lock-On* turret mode, should the dragon leave the playfield, the dragon will not be available for targeting by the player unless the dragon reappears sometime later and is re-targeted. Additionally, lower value dragons are excluded from the *Lock-On* turret mode. The *Lock-On* mode will automatically aim at a targeted dragon, and allows the player's shots to bypass non-targeted dragons and always hit the targeted dragon. The *Lock-On* feature can be enabled or disabled by the player at any time during game play.

Please Note: It was noted during our review of *Dragon's Ascent* that when utilizing the *Lock-On* mode, there were instances where shots fired at a dragon off screen could re-appear on the playfield. These instances occurred intermittently when focusing on a dragon that flies off screen while continuing to fire. In each case observed, the shots that re-appear on the playfield do not actually hit a target and will continue until leaving the playfield. Accordingly, this does not impact scoring and, therefore, does not alter any conclusions regarding skill levels.

Color Match

Dragon's Ascent contains a "Color Match" feature. *Color Match* displays a cycle of colors on the player's turret and the shots made. The cycle of colors continuously change in a preset sequence. The sequence of colors that appear are pink; red; orange; yellow; green; cyan; blue; and purple. The timing of color changes is uniform and is predictable to an attentive, practiced player. When a shot is fired by the player, the color of the shot will match that of the turret which fired the shot and change color when the turret changes color. To achieve the optimization available from use of the color-match feature, the match must be present when the shot initially hits the dragon.

Ultra Bonus

In addition to the normal *Color Match* feature, the *Dragon's Ascent System* also contains an *Ultra Bonus* feature. When the player fires a shot at dragon, a percentage of the shot value is

stored in the dragon's group. The storage will continue to build until a threshold is reached. Upon reaching the threshold, the *Ultra Reward* is unlocked for the specific group that reached the threshold.

When the *Ultra Reward* is unlocked for a specific group, the eligible dragons from the group will be highlighted by a halo. Upon capturing a highlighted dragon, the normal reward associated with the dragon will be multiplied by a predetermined Ultra multiplier amount, which is explained to the player within the help screen. The Ultra multiplier amounts are listed below:

- Group 1 – 20x
- Group 2 – 10x
- Group 3 – 5x
- Group 4 – 3x
- Group 5 – 2x

It should be noted that the *Ultra Bonus* feature will only remain active until the player captures a dragon or the shot cost is changed by the player.

Shot Power

Dragon's Ascent contains a "Shot Power" feature, which is displayed via five (5) vials of colored Shot Power fluid (Blue, Pink, Green, Yellow, and Red) next to each player's turret. Each vial is associated with a specific group of dragons ranging from 1-5 starting from left to right. The groups of dragons associated with each vial can be reviewed via the *Help* screen. The colors in the vials range from weak power to strong power in this order: Blue, Pink, Green, Yellow, and Red.

The *Shot Power* feature consists of numbers that repeat in sequence and average one (1). There is a separate set of numbers associated with each group of dragons, but each set equals one (1). The Shot Power of each shot on a dragon in a group is shown by the color and fill level of that group's vial. By firing a shot that contains more shot power fill level and color, the player has the opportunity to capture a dragon with a reduced number of shots.

After a shot is fired on a specific dragon, the shot power of the associated vial will change based on mechanism set sequence of numbers contained by the *Shot Power* feature. Only the vial associated with the dragon group of the shot fired on the specific dragon will change. The other vials will remain the same until a shot is fired on a dragon that is part of the group associated with the vial. The five (5) vials of *Shot Power* displaying the current shot power are displayed on the screen at all times. Since the vials are displayed to the players at all times, the amount of power that the next shot will have for each dragon group prior to committing to play is known to the player. Thus, the *Shot Power* feature allows the player to employ a strategy of shooting at desirable dragons when shot power is high, and when the shot power is low the player can shoot at one-shot dragons and small dragons to maximize the player's shots.

Defining Shot

The *Defining Shot* occurs during the first shot taken, on a dragon of each group and subsequently the first shot taken after the player makes a capture of a dragon associated with that group. When the *Defining Shot* is active, the player is alerted to the active availability of the *Defining Shot* when a specific vial of *Shot Power* is highlighted. When a dragon is hit with a *Defining Shot*, the *Color Match* of the shot determines the actual multiplier within the disclosed range that will be used to determine the reward value of the next dragon captured associated with the group.

For example, if the *Defining Shot* hits a dragon 70% color match, the actual value of the reward that will be rewarded for capturing that dragon will be the minimum percentage in the multiplier range disclosed in the reward Chart plus the points that result from multiplying the difference between the disclosed minimum and maximum multipliers by the color match percentage. Assume a dragon with a disclosed multiplier range of minimum ten times (10x) the shot cost and maximum of thirty times (30x) the shot cost. The difference between the two is twenty (20). This difference would be multiplied by the color match percentage to determine the actual multiplier that resulted from the player's capture. The color match percentage, namely 70%, would be applied to this difference, yielding $20 \times 0.7 = 14$. Thus, the multiplier that would be applied to the shot cost to determine the value rewarded for the capture would be $10 + 14 = 24$. If the capturing shot had cost the player 10¢, the value of the reward for the capture would be $[10¢ \times 24 =] \$2.40$.

Health Points of the Dragon

Each dragon available on *Dragon's Ascent* has a pre-defined amount of "Health Point" when the dragon first enters the playfield. The *Health Point* is the number of one-power shots that it takes to capture a dragon. The higher the amount of "Health Point" (*HP*) that a dragon has, the more difficult it is to capture, as more shots are required to capture the dragon. In general, the larger the dragon, the more *Health Points* that is required to capture the dragon, the larger the multiplier, and the larger the reward when the player captures the dragon. To deplete the dragon's *HP* to zero (0), the player must hit the dragon with the required number of shots. The first player to deplete the dragon's *HP* to zero (0) will capture the dragon.

SPECIAL REWARD AND HAZARD DRAGONS

Dragon's Ascent contains twelve (12) special dragons and a hazard dragon. At times there will be a plurality of special dragons on the playfield and at other times there will be no special dragons on the playfield. The player can wait for any desired special dragon to appear, without any time limitation.

Bonus Dragons

Dragon's Ascent contains three (3) different "Bonus Dragons", including the "Gold", "Ruby", and "Lightning" dragons. Each *Bonus Dragon* has been described below:

- Gold Dragon

The *Gold* dragon will appear on the playfield in a metallic golden color. This dragon has a higher reward of 40x to 200x shot cost. Below is an image of a *Gold* dragon:



Please Note: The *Gold* dragon image is only provided as an example of the appearance of a *Gold* dragon. Other dragon types may also appear as a *Gold* dragon. In other words, it is only the dragon's characteristic gold color and not the dragon's shape or size that identifies it as a "Gold" dragon.

Only certain dragons can appear on the playfield as *Gold* dragons in the metallic gold color. This includes all dragons from groups 1, 2, and 3. When captured by the player, this dragon will reward credits determined when the *Defining Shot* is fired and hits this *Gold* dragon. The *Color Match* of the shot determines the point within the multiplier range used to determine the value of the credits within the multiplier range for a *Gold* dragon. The multiplier range for the dragon is explained to the player within the Help feature.

- Ruby Dragon

The *Ruby* dragon will appear on the playfield in a ruby color. This dragon has a higher reward of 30x to 150x shot cost. Below is an image of a *Ruby* dragon:



Please Note: The *Ruby* dragon image is only provided as an example of the appearance of a *Ruby* dragon. Other dragon types may also appear as a *Ruby* dragon. In other words, it is only the dragon's characteristic ruby color and not the dragon's shape or size that identifies it as a *Ruby*.

Only certain dragons can appear in the playfield as *Ruby* dragons in the ruby color. This includes all dragons from group 1, 2, and 3. When captured by the player, this dragon will credits determined when the *Defining Shot* is fired and hits this *Ruby* dragon. The *Color Match* of the shot determines the point within the multiplier range used to determine the value of the credits within the multiplier range for a *Ruby* dragon. The multiplier range for the dragon is explained to the player within the Help screen.

- **Lightning Dragon**

Dragon's Ascent contains various *Lightning Dragons*. The *Lightning Dragons* are larger than the other dragons that appear on the playfield and include all dragons from group 5. These dragons also have a larger reward range.

The *Lightning Dragons* change appearance based on the game theme level currently in use. This dragon has a higher reward of 100x to 500x shot cost. Below are various images of the *Lightning Dragons* that appear within each theme:

Forest 1 Lightning Dragon



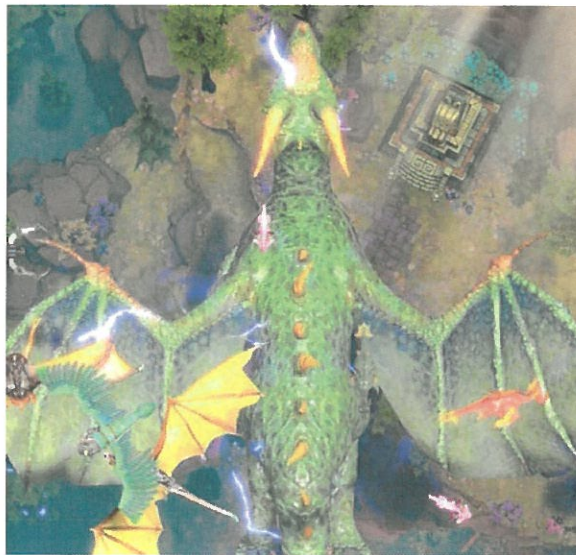
Japan Lightning Dragon



Medieval Lightning Dragon



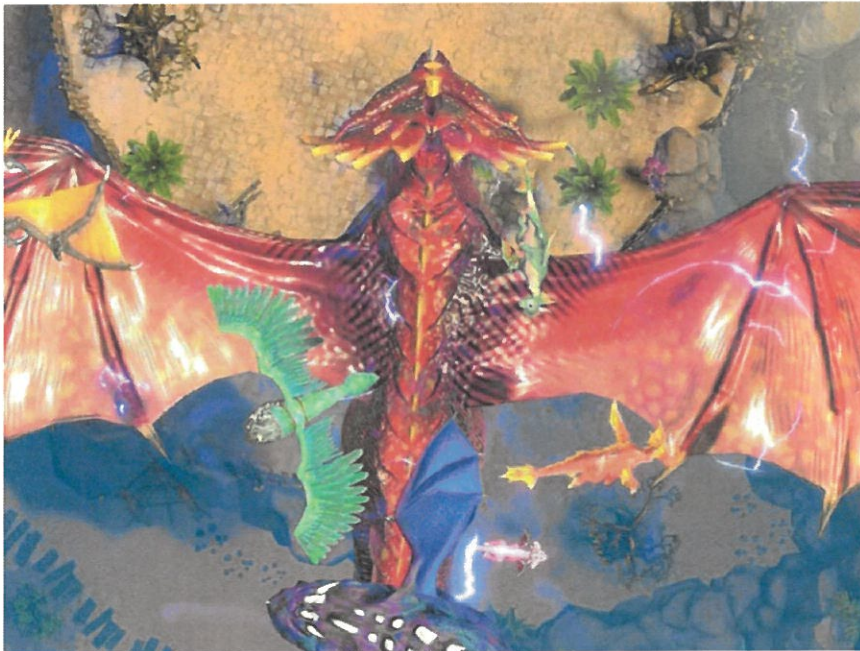
Forest 2 Lightning Dragon



Christmas Lightning Dragon



Desert 2 Lightning Dragon



Death 1 Lightning Dragon



Graveyard Lightning Dragon



Please Note: The *Lightning Dragon* images are only provided as an example of the appearance of this dragon type. As previously stated, each game theme level contains different *Lightning Dragons* that will have different appearances. In other words, it is only the dragon's characteristic lightning animation and not the dragon's shape or size that identifies it as a "Lightning."

The *Lightning Dragons* will present the reward as pulses when they are captured by the player. The value of the credit will be determined by the color match of the defining shot. The animation of the reward upon capture will display a number at the center of the playfield starting from one (1). The pulses will then produce an entertaining display of a shockwave which will hit all dragons currently displayed on the field.

One-Shot Dragons

Dragon's Ascent contains three (3) different "One-Shot Dragons", including the Chrome, Sapphire, and Emerald dragons. Each *One-Shot Dragon* has been described below:

- Chrome Dragon

The *Chrome Dragon* appears on the screen on a repeating cycle. The *Chrome Dragon* is displayed as a chrome metallic colored dragon, so that it can be easily identified on-screen by the player. Below is an image of the *Chrome Dragon*:



The *Chrome Dragon* is included within the *Lock-On* mechanism and can also be hit using the *Aim and Fire* mechanism to capture the *Chrome Dragon*. Color match does not apply to the *Chrome Dragon*, and the dragon is captured with a single shot regardless of the power of the shot. The player is not forced to shoot at any dragons that appear on the playfield and there is no time limit for the player to fire a shot. It is possible for the player to play the game and only fire at the *Chrome Dragon*. The *Chrome Dragon* rewards the player for an accurate shot with a reward equal to the cost of the shot that captured the dragon plus a minimum of an additional four percent (4%) to ten percent (10%).

Please Note: In instances where the reward attained would be a partial credit, the system will automatically round up the reward to the nearest whole cent.

- **Sapphire Dragon**

The *Sapphire Dragon* appears on the playfield on a repeating cycle. The *Sapphire Dragon* is displayed as a metallic blue colored dragon, so that it can be easily identified on-screen by the player. The dragon remains in the *Sapphire* form for only three (3) seconds before reverting into a normal form.

The *Sapphire Dragon* is included within the *Lock-On* mechanism, and can also be hit using the *Aim and Fire* mechanism. Color match does not apply to this dragon, and while in the *Sapphire* form the dragon can be captured with a single shot, regardless of the power of the shot, which rewards the player with a reward equal to the cost of the shot that captured the dragon plus a minimum of an additional four percent (4%) to ten percent (10%).

In instances where the reward attained would be a partial credit, the system will automatically round up the reward to the nearest whole cent.

While in the normal form, the dragon will follow the normal reward structure. Below is an image of the *Sapphire Dragon*, including the *Sapphire* form and *Normal* form:

Sapphire Form



Normal Form



- **Emerald Dragon**

The *Emerald Dragon* appears on the playfield on a repeating cycle. The *Emerald Dragon* is displayed as a metallic emerald colored dragon, so that it can be easily identified on-screen by the player. The dragon remains in the *Emerald* form for only three (3) seconds before reverting into a normal form.

The *Emerald Dragon* is included within the *Lock-On* mechanism and can also be hit using the *Aim and Fire* mechanism. Color match does not apply to this dragon, and

while in the *Emerald* form the dragon can be captured with a single shot, regardless of the power of the shot, which rewards the player with a minimum of 104% to a maximum of 110% of the shot cost worth of *Shot Power* points that will be applied to the next shot's *Shot Power*.

Please Note: In instances where the amount of *Shot Power* attained would be a partial credit, the system will automatically round up the amount to the nearest whole cent.

While in the normal form, the dragon will follow the normal reward structure. Below is an image of the *Emerald Dragon*:

Emerald Form

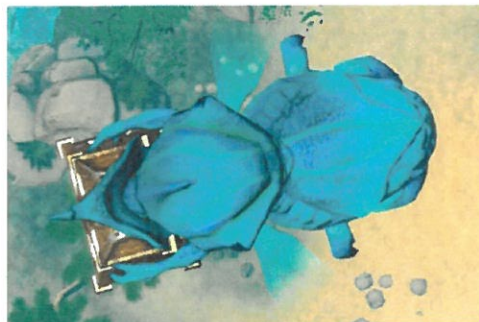


Normal Form



Free Shot Dragon

This dragon will appear on the playfield holding a treasure chest. This dragon has a higher reward of 50x to 250x shot cost. Below is an image of the *Free Shot* dragon:



When the player captures the *Free Shot* dragon, the player is rewarded free shots. The number of *Free Shots* that are rewarded to the player are based on the player's color match on the *Defining Shot* and shot cost used to hit the dragon. When the *Defining Shot* is fired and hits the dragon, the *Color Match* of the shot determines the point within the multiplier range used to determine the reward within the multiplier range for the *Free Shot* dragon. The multiplier range for the dragon is explained to the player within the Help screen.

When the *Free Shot* feature is active, the player's turret will be highlighted in green and display a "Free Shot" meter that will display the reward amount. The player fires at dragons until the reward amount determined by the player's *Defining Shot* and shot cost used to hit the dragon is credited. Below is an image of the *Free Shots* when activated:



If the player has been rewarded *Free Shots*, they are priority and will be played first before the player's actual credits are used. *Free Shots* cannot be redeemed for value by pressing the Tickets button. If the *Tickets* button is pressed to redeem the player's credits while the player has *Free Shots*, a message is displayed instructing the player to use their *Free Shots* before redemption can be completed.

Laser Dragon

This dragon will appear on the playfield as a mechanical beetle. This dragon has a higher reward of 50x to 250x shot cost. Below is an image of the *Laser* dragon:



When the player captures the *Laser* dragon, the player is rewarded with the *Laser* dragon mechanism. The *Laser* dragon will fire one or more single laser shots when activated by the player. The number of laser shots that are rewarded to the player are based on the player's color match on the *Defining Shot* and shot cost used to hit the dragon. When the *Defining Shot* is fired and hits the dragon, the *Color Match* of the shot determines the point within the multiplier range used to determine the value of the reward within the multiplier range for the

Laser dragon. The multiplier range for the dragon is explained to the player within the Help screen.

When the *Laser* feature is active, the player's turret is converted into a laser cannon that can fire single high-powered shots across the playfield that may capture numerous dragons simultaneously and display a "Laser Win" meter that will display the reward. The player continues to fire at dragons until the reward amount determined by the player's *Defining Shot* and shot cost used to hit the dragon is credited. Below is an image of the *Laser* dragon conversion onto the player's turret:



Rocket Launcher Dragon

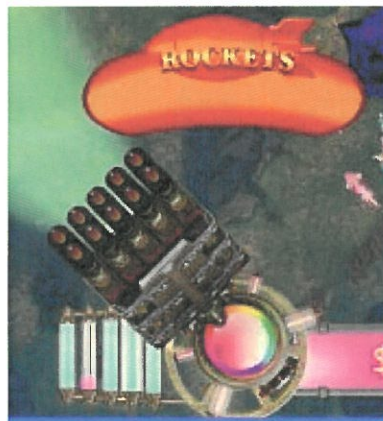
This dragon will appear on the playfield as a beetle carrying a rocket launcher. This dragon has a higher reward of 50x to 250x shot cost. Below is an image of the *Rocket Launcher* dragon:



When the player captures the *Rocket Launcher* dragon, the *Rocket Launcher* dragon will fire one or more sets of rockets when activated by the player. The *Rocket Launcher* will emit a cone of light across the playfield that can be controlled by the player before activating the

shot. Dragons that are within the cone of light will be marked with a yellow dragon icon, which indicates the dragons that will be hit. The number of rocket shots that are rewarded to the player are based on the player's color match on the *Defining Shot* and shot cost used to hit the dragon. When the *Defining Shot* is fired and hits the dragon, the *Color Match* of the shot determines the point within the multiplier range used to determine the reward within the multiplier range for the *Rocket Launcher* dragon. The multiplier range for the dragon is explained to the player within the Help screen.

When the *Rocket Launcher* feature is active, the player's turret is converted into a rocket launcher that can fire a volley of rockets across the playfield that may capture numerous dragons simultaneously and display a "Rockets" meter that will display the reward. The player continue to fire at dragons until the reward determined by the player's color match on the *Defining Shot* and shot cost used to hit the dragon is credited. Below is an image of the *Rocket Launcher* conversion onto the player's turret:



Rainbow Dragon

The reward amount for the *Rainbow* dragon increases during game play based on a percentage of the cost of all shots fired by all players and a percentage of the value of all shots fired directly at the dragon.

The *Rainbow Dragon* will continuously cycle its color in order to make it more difficult for the player to attain a color match on the dragon. The *Rainbow Dragon* can only experience damage to *HP* from a *Color Match* shot in excess of 40%. The *Rainbow Dragon* can only be captured after enough powerful shots have hit the dragon and the *HP* of the dragon is reduced to zero (0).

While firing shots at the *Rainbow Dragon*, it is possible for the player to receive interim credits from reducing the dragon's *HP* by utilizing the *Shot Power* that is infused in the turret. The amount that can be rewarded through interim credits is displayed via the *Lock-On* method.

The interim rewards will be credited to the player in the form of treasure chests that will be released from the *Rainbow Dragon*. The interim rewards are released upon shooting the dragon and automatically credited to the player. The player is not required to shoot the

treasure chest to receive interim rewards. The interim rewards are not the actual ascending credits that are attained by capturing the *Rainbow Dragon*. Below are images of the *Rainbow Dragon*, and interim rewards:

Rainbow Dragon



Interim Rewards



Comet Feature

Dragon's Ascent contains the *Comet* feature, which can only be initiated when the player has not fired a shot or changed the shot cost for approximately ten (10) seconds. The player must then utilize the joystick and tap the joystick in the upward direction three (3) times in quick succession. If completed successfully, the *Comet* will launch near the player's turret onto the playfield.

While the *Comet* is on the playfield, any shots fired by the player will not be able to hit anything other than the *Comet*. The *Comet* will grow in size and value, then shrink and diminish in value over time before leaving the playfield. The object of the *Comet* is for the player to wait and observe the *Comet* after launch until the tail of the comet is at its largest before firing a single shot to destroy the *Comet*. If the player destroys the *Comet* when it is at its largest, the player will be rewarded a minimum of 104% up to a maximum of 110% of the shot cost.

Please Note: In instances where the reward attained would be a partial credit, the system will automatically round the reward up to the nearest whole cent.

The following are images of the *Comet*:

Launch of the *Comet* Feature



Shadow Dragon

The *Shadow Dragon* is a small dragon that traverses across the playfield and is highlighted with a red “X” icon. Below is an image of the *Shadow Dragon*:



This dragon cannot be captured. When this dragon is hit either through the *Aim and Fire* or *Lock-On* mode, the *Shadow Dragon* will penalize the player whose shot hit the *Shadow Dragon* by shooting lightning at the player's turret, which will temporarily disable game play for approximately three (3) seconds for the player(s) that hit the dragon. Additionally, when the *Shadow Dragon* is hit, 50% of the player's accumulated *Shot Power* is removed and is added to a public pool.

Section V – Outcome Determination

Based upon a reasonable degree of engineering certainty, game outcome determination is based exclusively upon the player's skillful interaction with *Dragon's Ascent*. The player is provided with several controls, features and information for means of enhancing the effectiveness of shots made, that the player can utilize to increase rewards achieved from playing *Dragon's Ascent*. In order to score optimally, the player must manage the interaction of the player-controlled features; special and hazard dragons; and features to return to the player credits or *Shot Power* from the shots taken in the game. Additionally, if the player does not aim accurately and hit the dragons, the player will need to use more shots in order to capture a dragon thus reducing their overall score.

During the review and analysis of the *Dragon's Ascent System* it was found that the dragons that are available on the game will enter the playfield and exit at another point on the playfield. Additionally, the dragons that appeared in the game appeared in similar patterns, which through attentive observation over time were able to be anticipated. The *Dragon's Ascent System* does not employ the use of a random number generator (RNG) to affect the player's ability to capture a dragon or be rewarded a reward.

All players are required to hit a dragon with the same number of one-power shots regardless of the cost to the player of each shot. The cost to the player of each shot does not play a factor in depleting a dragon's "Health Point". Most dragons have a predefined range of value, which is disclosed to the player via the Help function of the game. The actual reward that is rewarded to the player is a reward amount within the value range for a specific dragon, which is affected by the *Defining Shot* mechanism. The actual reward amount within the multiplier range stated in the Reward Chart is calculated using a formula, which includes the color match value and the cost of the shot. The formula used to calculate the actual reward is provided below:

Formula: **(Color Match value * Shot Cost) = Actual Reward**

Section VI - Review of Source Code

Nick Farley & Associates, Inc. was provided with the full software source code associated with the *Dragon's Ascent System v. DA1 105.02 GEN 12399*. The review and evaluation of software source code is essential in establishing system operation and game outcome determination. This source code has been disclosed in confidence. In respect of this

confidential information, specific excerpts from the source code will not be included with this document to protect its proprietary nature. The source code's affect on the game will be discussed in broad terms.

Our review of the source code indicates that the *Dragon's Ascent System vDA1 105.02 GEN 12399* has been designed to not utilize a random number generator (RNG) or a compensating algorithm to affect the player's ability to capture a dragon or be rewarded a prize. Game outcome determination is based exclusively upon the player's interaction with *Dragon's Ascent* by utilizing the provided player controls, in-game turrets, and game play features.

Section VII - System Software Information

The software associated with *Dragon's Ascent* is housed on the storage media of the CPU board located within the machine, and controls the game processes, including elements that affect win outcome integrity and win outcome determination. The files pertaining to system operation, integrity and/or outcome determination are contained within a compressed and encrypted Option File System (OptFS) that is contained on *Dragon's Ascent*.

For software verification purposes, the *Validation Drive Technology*, was utilized to obtain an **MD5** signature of the OptFS containing the *Dragon's Ascent System* software. *Nick Farley & Associates, Inc.* has validated, and verified the accuracy of the **MD5** signature output of the *Validation Drive Technology* software. The *Validation Drive Technology* software is contained on a *Validation Drive*, which is a USB flash drive.

To ensure that the version of the *Validation Drive Technology* software program is identical to that used during our testing, signatures of the *Validation Drive Technology* software should be obtained and verified using the **FileCheck** program. The **FileCheck** results for the *Validation Drive Technology* software are located within the attached Appendix C. In addition to the signatures of the *Validation Drive Technology* software, instructions on utilization of the tool have been included within the attached Appendix C.

The *Validation Drive* calculates a unique **MD5** signature of the OptFS, which contains the *Dragon's Ascent* game software. The *Validation Drive Technology* software will then compare the **MD5** signature output from the software installed on the machine (in public space or otherwise in the field) against a known good version of software that is located on the *Validation Drive* to validate the software as identical or not identical to the software tested by *Nick Farley & Associates, Inc.* upon which this report and opinion is based. If the **MD5** signature output is not identical to the **MD5** signature of the known good software version, then the *Validation Drive Technology* software will produce failing validation results.

The **MD5** signatures for *Dragon's Ascent* will be obtained using the *Validation Drive Technology* software, provided *Dragon's Ascent* software remains the same as tested. Should the software be altered in any way, the **MD5** values will change. The **MD5** signatures for *Dragon's Ascent* software can also be found with the attached Appendix C.

Section VIII - Findings and Conclusions

Based upon our review of the *Dragon's Ascent System vDAI 105.02 GEN 12399* and associated source code, to a reasonable degree of engineering certainty, we have determined that the game outcome is based exclusively upon the player's interaction with the game. The ability of the player to win prizes is completely dependent upon the player's skill, such as the ability to skillfully aim and hit the prize-awarding dragons, utilization of the *Color Match* and *Shot Power* features, utilization of the *Help* and *Reward Chart* information, etc. rather than on any chance elements in the game.

Therefore, *Nick Farley & Associates, Inc.* concludes, with a reasonable degree of engineering certainty:

1. The *Dragon's Ascent System vDAI 105.02 GEN 12399* software was reviewed on the submitted *DualPlay* cabinet. The *DualPlay* cabinet is a stand-alone machine, which features two (2) player stations and a 32" monitor, which is used as a horizontal video playfield.

Please Note: *Nick Farley & Associates, Inc.* has also been informed that the software can also be installed and operated on *SinglePlay* cabinets as well.

2. The *Dragon's Ascent System* provides the player with a method to insert one or more bills into one of the bill acceptors of an available player station. Bills inserted into the bill acceptor will be established as credits to be used in game play. The player must then select their desired shot cost, which determines the quantity of credits that will be expended per single shot. The player utilizes the provided controls and available in-game turrets, features and information to capture dragons as they move across the playfield. The dragons that are captured will result in specific rewards which will be added to the player's credit balance and made available to the player at redemption or continued play, as the player may choose.
3. The *Dragon's Ascent System* contains a mechanism for the player to launch *Help* screen. Activating the *Help screen* produces a screen which furnishes explanations for *Dragon's Ascent*, including information on game play, in-game features, game rules, and *Reward Chart*. The *Reward Chart* within the *Help screen* displays the ranges of possible values for each dragon. The *Help screen* is available at each individual player station and can be launched at any time by the player.
4. The outcome of the game is not based on the number or ratio of prior wins to prior losses or any other factor relating to the profit or revenues retained by the operator from prior plays of the game. None of the variables in game play that the player must overcome are controlled by a random number generator or compensating algorithm.

Depending on the player's skill, such as the ability to skillfully aim and hit the prize-awarding dragons, utilization of the *Color Match* and *Shot Power* features, utilization of the *Help* and *Reward Chart* information, etc., all dragons (except the "Shadow Dragon") are available for capture at a return to the player of greater than 100%. Shots have to be accurately aimed to hit a dragon. The *Dragon's Ascent* does not allow ricochets or shots bouncing off an object to then randomly hit a dragon.

5. A mechanism for verifying game software exists. *Nick Farley & Associates, Inc.* has validated and utilized the *Validation Drive Technology* software, which is a software verification tool to obtain the software signatures listed within the attached Appendix C. Additionally, to ensure that the version of the *Validation Drive Technology* software program is identical to that used during *our testing*, signatures of the *Validation Drive Technology* software should be obtained and verified using the **FileCheck** program. The **FileCheck** results for the *Validation Drive Technology* software are located within the attached Appendix C. A copy of the **FileCheck** CRC32 program may be obtained free of charge from our website, www.eclipsetesting.com.

Section IX – Terms and Conditions

It is hereby expressed that *Nick Farley & Associates, Inc.* has reviewed the submitted game system through the engagement of play of the game themes, and analysis of the submitted software program source code. *Nick Farley & Associates, Inc.* has performed extensive research and analysis to determine the findings and conclusions of fact presented in this document. Our findings and conclusions are based exclusively on the information provided for our review and our conclusions are stated to a reasonable degree of engineering certainty. Any changes or modifications of the information provided will require additional review to determine if they support the findings and conclusions of this report. In such an instance, we reserve the right to amend or revise this document.

This document has been prepared by *Nick Farley & Associates, Inc.* on behalf of Richard L. Tapp, Jr. of Nexsen Pruet, LLC Attorneys and Counselors at Law. Distribution of this document is limited exclusively to *Nick Farley & Associates, Inc.*, Richard L. Tapp, Jr. and SC Games of Skill, LLC. This report shall not be reproduced, except in full, without the written approval of *Nick Farley & Associates, Inc.* Only authorized copies of this report received from *Nick Farley & Associates, Inc.* are considered authentic. Upon written request by any of Mr. Richard L. Tapp, Jr., or legal counsel to SC Games of Skill, LLC, or an authorized member of SC Games of Skill, LLC, *Nick Farley & Associates, Inc.* will send this report via email or other means, as may be determined by *Nick Farley & Associates, Inc.* *Nick Farley & Associates, Inc.* takes precautionary measures to secure the PDF document, but *Nick Farley & Associates, Inc.* does not send the email via any encrypted methodology.

If you should have any questions or require additional information, please feel free to contact our office.

Sincerely,



Nick Farley
President

NF/sc
NA_PACE_5459-01_EW
Attachments

APPENDIX A

Nick Farley & Associates, Inc. dba
eclipse Compliance Testing (*NFA/eclipse*)

Company Biography



Nick Farley & Associates

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INTRODUCTION

Based in the greater Cleveland, Ohio area, *Nick Farley & Associates, Inc.* dba **edipse Compliance Testing (NFA/edipse)** is an ISO 17025 and 17020 accredited Independent Testing Laboratory (ITL) with continuous accreditation since June 1, 2009.

Founded in November 2000, *NFA/edipse* serves the compliance testing needs of the regulated casino gaming industry (Class II & III), and State Lotteries. *NFA/edipse* is a current member of the North American Gaming Regulators Association (NAGRA), the New Jersey Amusement Association (NJAA), Oklahoma Indian Gaming Association and the Oklahoma Tribal Gaming Regulators Association (OTGRA).

Since our beginning in 2000, our company has consistently grown. In mid-2009 we completed an expansion of our current testing facility in Solon, Ohio. Presently, we are authorized as an Independent Testing Laboratory (ITL) with more than 250 regulatory agencies, domestic and international, and continue our focused efforts to expand our reach. Our management team has decades of gaming, amusement and lottery industry expertise and experience.

NFA/edipse is experienced with the manufacturers and distributors of the systems and devices utilized in gaming establishments, lotteries, and amusement centers, including Class II Gaming Systems, Electronic Pull Tab Systems, and other electronic gaming devices utilized throughout the world. Throughout our history, we have worked with the world's leading manufacturers and distributors of gaming devices and systems, and have been retained to perform services for many regulatory agencies.

NFA/edipse is pleased to provide the following information as support to confirm and verify that *NFA/edipse* is a well recognized testing laboratory and can fully perform all of the functions necessary to successfully evaluate and analyze the *Dragon's Ascent System v.DA1 105.02 GEN 12399* game.

Company Overview

NFA/edipse serves the regulated gaming, lottery and amusement industries as one of the market leaders in the field of regulatory compliance testing by playing a key role in certifying gaming devices and systems for a growing list of manufacturers for the ultimate benefit of the regulator. As an established and widely recognized Independent Test Laboratory, *NFA/edipse* has the expertise and experience necessary for the evaluation and analysis of the *Dragon's Ascent System v.DA1 105.02 GEN 12399* game.

NFA/edipse is experienced with the manufacturers and distributors of the systems and devices utilized in gaming establishments, lotteries, and amusement centers all over the world. Throughout our history and work experience, we have worked with the world's leading manufacturers and distributors for a wide variety of gaming devices and systems.

Keeping the interests of the public in mind as a priority is certainly at the root of what we do. This view forms the basis with which we approach our business practice. We refer to it as integrity; delivering reliable, accurate and trustworthy service. As an ISO accredited testing laboratory, our internal procedures are built around quality, thoroughness and continuous improvement. This is achieved by direct involvement and oversight by our organization's executive staff, which has decades of industry experience.

A portion of our experience lies in the expertise of our President, Nick Farley, a former regulator with the New Jersey Division of Gaming Enforcement, who has dedicated his entire professional career of more than 28 years, to the test and evaluation of electronic gaming devices and systems, including Class II gaming systems, video lottery systems, RNG analyses and electronic pull tab systems. Mr. Farley is considered an expert in the field of gaming device testing and regulation, having testified as an expert witness on behalf of federal, state and local law enforcement agencies, and has assisted regulatory agencies with the development of technical standards.

Additionally, Vice President, Janice Farley, has more than two-and-a-half decades experience in corporate America, having served in various capacities with the General Electric Company (GE). While serving GE, Mrs. Farley has gained experience in technical and project management, quality, relationship development, and management, among many other noteworthy skills, which have proven to be most valuable in the growth and development of *NFA/edipse*.

Led by these highly skilled professionals, the *NFA/edipse* team is well poised to serve as a leading testing laboratory.

It is through our broad skills and abilities, and cohesive team philosophies that we are confident in our abilities to provide a detailed review and analysis of the *Dragon's Ascent System v.DA1 105.02 GEN 12399* game.

Experience

With more than 28 years of experience in gaming device and system testing for numerous gaming jurisdictions, Nick Farley, *President*, oversees the *NFA/edipse* operation. Mr. Farley is a former gaming regulator, having served the New Jersey Division of Gaming Enforcement for four years. Mr. Farley then accepted employment with another ITL to help that organization, which was a start-up company at the time, grow in many ways. Mr. Farley worked with this competitor ITL for nine (9) years, before leaving to begin *NFA/edipse* over 15 years ago.

Additionally, having over 25 years experience with one of the best managed companies in the world (GE), Janice Farley, *Vice President*, brings operational excellence to the organization and ensures that testing procedures and methods are developed with thoroughness and efficiency in mind.

It is through their vast experience and the imparting of their knowledge within the company's technical team over the years that these co-founders are confident that as an Independent Testing Laboratory, *NFA/edipse* has delivered a detailed review and analysis of the *Dragon's Ascent System v.DA1 105.02 GEN 12399* game.

Integrity, impartiality and independence are key factors with an Independent Testing Laboratory. The laboratory should be familiar with regulatory requirements, and various manufacturers' equipment, maintaining a close working relationship with manufacturers and regulators alike. A laboratory should not assist a manufacturer with the design of its products, it should only advise on regulatory matters. The laboratory should offer its knowledge and experience to regulatory agencies in guiding them through standards and regulations development. It should seek the advice of the regulatory agency when a manufacturer's design may not be clearly defined by the existing standards and regulations. This open communication between the laboratory, manufacturer and regulator fosters good will and understanding. This is the role and practice of *NFA/edipse*.

NFA/edipse currently employs a sufficient staff of several gaming professionals, and we are constantly searching out talented new potential staff. Each staff member is responsible for various parts of our business operation, and therefore, may have a level of direct involvement in the testing services which has been provided to the customer.

The breadth of these talented individuals comprises a variety of disciplines as follows:

- Mathematicians
- Software Engineering
- Electrical Engineering
- Mechanical/Hardware Engineering
- Communications/Systems
- Compliance
- Quality
- Field Inspections

Note: Some of the team members are multi-degreed and therefore multi-disciplined. The above listing comprises the skill base as a whole and provides a snap-shot overview of the team's abilities which provides operational flexibility.

History

eclipse Compliance Testing is a registered trade name of *Nick Farley & Associates, Inc. (NFA)*, which was introduced as the compliance testing division of the organization in August of 2007. *NFA*'s primary business area is in Expert Witness, which is separate from the functions of **eclipse Compliance Testing**, which is dedicated completely to compliance testing services. *NFA* is a privately held Subchapter-S Corporation, incorporated in the State of Ohio.

Below is a brief outline of the company's history:

- **November 2000**: *NFA* is established.
- **January 2001**: *NFA* relocates from New Jersey to Solon, Ohio.
- **February 2001**: *NFA* begins consulting to assist in game classification matters.
- **February 2002**: *NFA* achieves its first authorized jurisdiction – (New Jersey Legalized Games of Chance Control Commission).
- **April 2003**: *NFA* receives its first international authorization from the Saskatchewan Liquor and Gaming Authority.
- **September 2003**: National Indian Gaming Commission uses *NFA* lab report to help in classification determination of Multimedia Games' *ReelTime Bingo*.
- **March 2004**: *NFA* incorporates as an Ohio corporation.
- **October 2004**: *NFA* moves office/lab to commercial space in Bedford, Ohio.
- **December 2005**: *NFA* achieves licensure with the Oklahoma Horse Racing Commission.
- **November 2006**: *NFA* relocates into new, larger facility in Solon, Ohio.
- **January 2007**: *NFA* achieves its 100th authorized jurisdiction.
- **August 2007**: Trade name **eclipse Compliance Testing** introduced.
- **January 2008**: **eclipse** received vendor certification from the Minnesota Gambling Control Board
- **September 2008**: **eclipse** is recognized as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for the year 2008.
- **September 2008**: *NFA* wins project with Ohio Lottery to perform daily RNG analysis of Keno game.
- **June 2009**: **eclipse** achieves ISO 17025 Laboratory Accreditation.
- **June 2009**: **eclipse** is recognized for second consecutive year as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for the year 2009.
- **July 2009**: **eclipse** completes expansion of Solon facility to a total of 11,000+ square feet.

- **July 2009:** **eclipse** wins project with Oklahoma Lottery to perform RNG analysis on lottery developed RNG.
- **August 2010:** President, Nick Farley, receives the Warrior Award from the Oklahoma Indian Gaming Association for his lifetime contributions in supporting Oklahoma Indian gaming.
- **November 2010:** **eclipse** celebrated its 10th Anniversary.
- **December 2010:** **eclipse** received the Weatherhead 100 Award as one of the fastest growing up-start companies in Northeast Ohio.
- **May 2011:** **eclipse** is recognized for fourth consecutive year as Cleveland's Best in the Laboratory category by the USLBA "best of Local Business" Award Program for 2011
- **December 2011:** **eclipse** received the Weatherhead 100 Award for the second consecutive year as one of the fastest growing companies in Northeast Ohio.
- **January 2012:** **eclipse** received certification as an Independent Testing Laboratory from the Ohio Casino Control Commission.
- **March 2012:** **eclipse** received Video Lottery Technology Provider License from the Ohio Lottery Commission.
- **June 2012:** **eclipse** is recognized for fifth consecutive year as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for 2012.
- **June 2012:** **eclipse** is certified by the Maryland Lottery and Gaming Control Agency as a fully qualified Independent Testing Laboratory with full testing authorization within the jurisdiction of the MLGCA.
- **September 2013:** **eclipse** is recognized for sixth consecutive year as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for 2013.
- **August 2014:** **eclipse** wins project with Ohio Lottery to conduct testing of the Intralot MPNG terminals and electronic video games with, and for the benefit of, the Ohio Lottery.
- **September 2014:** **eclipse** is recognized for seventh consecutive year as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for 2014.
- **September 2015:** **eclipse** is recognized for eighth consecutive year as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for 2015.
- **June 2016:** **eclipse** wins project with Texas Lottery Commission for the evaluation and analysis of Random Number Generators and Systems to be Utilized with *Retailer Cash Incentive Program Drawings* and *Internet Entry Promotional Second Chance Drawings* operated by the Texas Lottery Commission.

- **September 2016:** **eclipse** is recognized for ninth consecutive year as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for 2016.
- **September 2017:** **eclipse** is recognized for tenth consecutive year as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for 2017.
- **September 2018:** **eclipse** is recognized for eleventh consecutive year as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for 2018.
- **October 2018:** **eclipse** wins another project with Texas Lottery Commission for the evaluation and analysis of Random Number Generators and Systems to be Utilized with *Internet Entry Promotional Second Chance Drawings* operated by the Texas Lottery Commission.
- **September 2019:** **eclipse** is recognized for twelfth consecutive year as Cleveland's Best in the Laboratory category by the USLBA "Best of Local Business" Award Program for 2019.

Awards and Recognitions

USLBA Best of Cleveland

For six consecutive years (2008 - 2013), *NFA/eclipse* was selected for the Best of Cleveland Award in the Laboratories category by the U.S. Local Business Association (USLBA).

The USLBA "Best of Local Business" Award Program recognizes outstanding local businesses throughout the country. Each year, the USLBA identifies companies that they believe have achieved exceptional marketing success in their local community and business category. These are local companies that enhance the positive image of small business through service to their customers and community. Winners are determined based on the information gathered both internally by the USLBA and data provided by third parties.

Warrior Award

As a tribute to a lifetime of commitment and dedication to the industry, President, Nick Farley, was presented the *Warrior Award* from the Oklahoma Indian Gaming Association at its 2010 Annual Conference and Trade Show. This prestigious award is presented to select individuals who have had a positive and lasting impact on the industry.

Weatherhead Award

NFA/eclipse has been named a two-time Weatherhead 100 Award winner (2010, 2011). This award recognizes the fastest growing businesses in Northeast Ohio and considers the business' growth over the past 5 years.

APPENDIX B

Dragon's Ascent System v.DA1 105.02 GEN 12399
Help Screen

Goal

Shoot dragons to win credits! Credits are redeemable for cash. Credits are determined by which dragon is captured. Skill in evaluating and executing will determine success at Dragon's Ascent. Have fun!

How to Play – Quick Start

- Insert cash for credit to play.
- Credit is displayed to the right of the gun turret.
- Each shot costs the amount displayed in the turret.
- Aim shots with the joystick.
- Fire shots with the Shoot button.
- Capture dragons using shots to win additional credits.

Control Panel

Joystick

Aim the turret at dragons.

Hold joystick up and press the Raise Shot Cost button to display the Help Menu.

Shoot button

Tapping – single shot.

Hold down – auto fire.

Shot Cost button

Change the amount of credit used per shot.

Lock-on button

Tap to switch between "Aim and Fire," and "Lock-on" Modes.

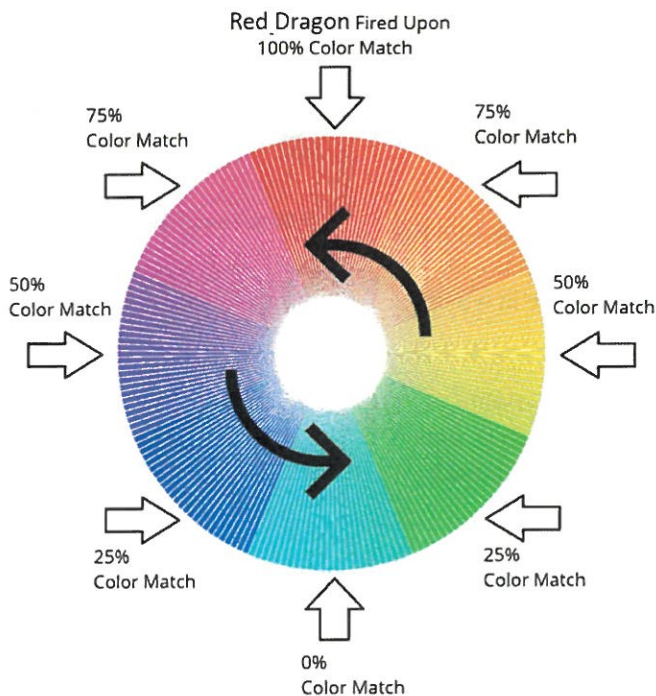
Ticket button

With additional credits remaining, play may be ended by pressing the ticket button which will print out a ticket verifying that number of credits.

Color Match

Part of the skill to learn in Dragon's Ascent is timing shots so the color of those shots is as close as possible to the color of the dragon at which the player aims. The color of the turret and the color of the shot when fired, cycle on a regular, repeating basis. In the illustration below, if the shot color is red when it hits a red dragon, it will be a 100% color match. The better the color match, the greater the number of credits may be earned. Colors cycle after firing, so judge the shot to the distance to the intended target dragon.

Colors cycle in the following manner:

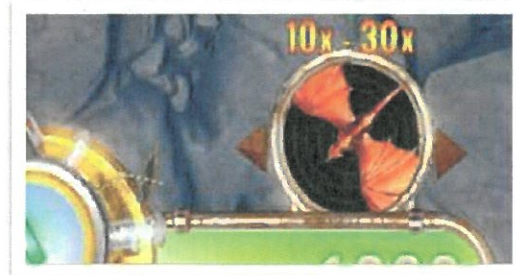
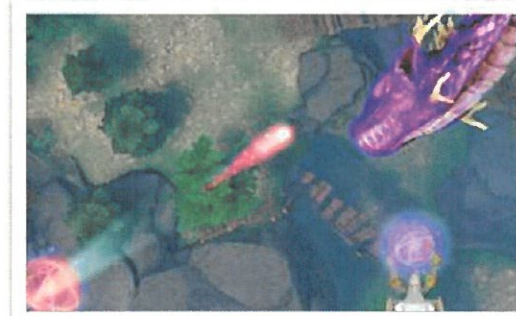


Matching the color of the shot to the color of a dragon maximizes winnings.

Defining Shot

Dragons are arranged into five groups as illustrated in the Reward Chart. The first time a dragon is shot in each group, the level of that color match determines the relative value of that group between the values listed on the Reward Chart. For example:

- A Defining Shot is indicated by a white halo on the vials. (White glow surrounding the vials). Vials are located on the left-hand side of the player turret.
- If the Defining Shot is red, and a player aims and hits a red dragon, that's a 100% Color Match.
- The 100% Color Match means that the reward received when this dragon is captured is 100% of the value on the Reward Chart.
- For a dragon with a reward range of 10x to 30x, that would be a reward of 30x shot cost.



Shot Power

- While color match defines the number of credits, the Shot Power determines how quickly a dragon can be captured.
- The stronger the Shot Power the fewer shots required to capture a dragon.
- Shot Power vials display next to the turret.
- Each vial corresponds to a Group of dragons; Group 1 on the left to Group 5 on the right.
- See the Reward Chart to learn which dragons are in which Groups.

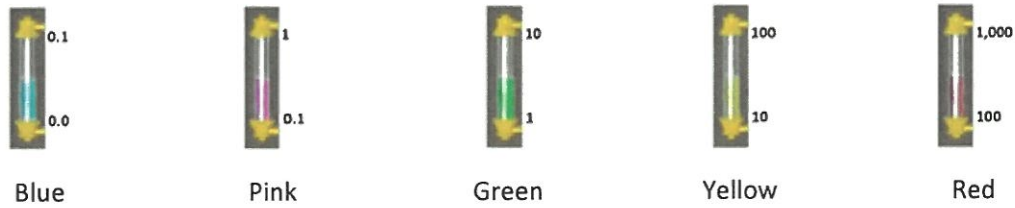


After each shot, the amount and color of fluid in each vial will change. Part of the skill in Dragon's Ascent is judging which group of dragons to target based on the level and color of the fluid in each vial.

- Fluid color and level in each vial is a multiple of the shot cost to give the shot power. (Example: If a vial is full of pink fluid, shot power will be equal to shot cost with a good color)

match, or if a vial is half full of green fluid shot power will be 5 times shot cost with a good color match.)

Values of Vial Fluid Colors:



- The colors in the vials range from lowest to highest value.

Lock-on Mode

Tap the Lock-on button on the Control Panel to switch between “Aim and Fire,” and “Lock-on” Modes.

Lock-on Mode



- Lock-on mode bypasses dragons in the path of the intended target.
- Lock-on is indicated with a dotted line from the turret to the target dragon. The turret automatically follows the dragon’s path across the screen.
- In Lock-on mode, Lock-on targets can change by pushing to the right or to the left on the joystick.
- Note that the smallest dragons (all of group 1) cannot be locked onto.

Dragons

Most dragons require multiple shots to be captured. The number of shots will depend on the group, the color match, and the shot’s power as indicated by the fluid level and color in each group’s vial. However, some dragons can be captured with one shot regardless of the color match or shot power.

One Shot Captures

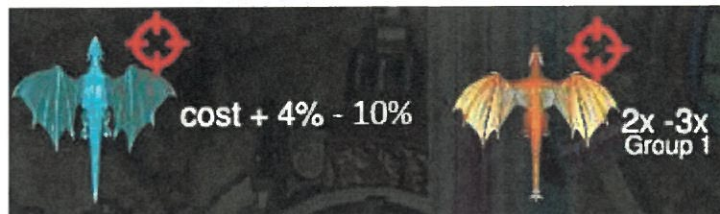
Chrome Dragon

- With 1 shot rewards shot cost plus 4-10%.



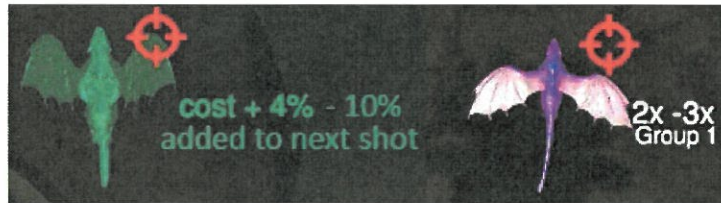
Sapphire Dragon

- With 1 shot, while in sapphire form, rewards shot cost plus 4-10%.
- Changes into a normal dragon after 3 seconds.



Emerald Dragon

- With 1 shot, while in emerald form, rewards shot cost plus 4-10% to the next shot.
- Changes into a normal dragon after 3 seconds.



Comet

- If no shots are fired or shot cost changed for several seconds, energy builds up that allows a Comet to be launched (via a triple tap UP on the joystick). The Comet emerges next to the turret, increases in size and value, then shrinks and diminishes in value before leaving the screen.
- Wait until the tail of the Comet is at its largest before firing a shot to destroy the Comet.
- When the Comet is at its largest, the reward is the shot cost plus 4-10%.



Bonuses

Ruby and Gold Dragons

- Any dragon from group 1, 2, and 3, can turn into a ruby or gold dragon. Be on the lookout for these dragons because they have a higher reward of 30x-150x shot cost for ruby and 40x-200x shot cost for gold.



Dragon Beetles

- Dragon Beetles reward special abilities to capture multiple dragons. See the Reward Chart for the value of capturing Dragon Beetles.

Free Shots

- Capturing this dragon rewards free shots.
- Free shots will capture multiple dragons for a limited time when accurately aimed and timely fired.



Laser

- Capturing this dragon rewards with a power-up laser.
- The laser captures multiple dragons when accurately aimed and timely fired.



Rocket Launcher

- Capturing this dragon rewards with a rocket launcher.
- The rocket launcher captures multiple dragons when accurately aimed and timely fired.



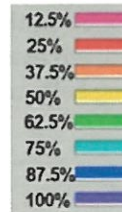
- Rocket launcher displays a targeting cone in front of the turret.

Rainbow Dragon

It takes special skill to capture this dragon, but there are special rewards as well. Color match on the defining first shot to hit this dragon sets the reward. Consult the location for the range of rewards.



The color of the reward shown on the dragon is the reward value. A pink number equals the lowest level, purple equals highest level, and values in between as shown in the image on the right. The amount of the dollar figure shows how close the reward is to being winnable. A part of every shot at every dragon damages the rainbow dragon and gets it closer to the maximum reward. Shots that hit the rainbow dragon do more damage and add more to the reward until it is won. The rainbow dragon rewards are the largest in Dragon's Ascent.



Interim rewards on the way to the maximum reward are disclosed when the treasure chest opens.



Ultra Bonus

- Ultra bonus gives rewards a boost.
- When a shot is fired at a dragon, a percentage of the shot value is added to that dragon's Group. The shot value in the Group accumulates until a threshold is unlocked and made available for an Ultra reward!



Every dragon eligible for the Ultra reward is surrounded by a halo matching the color of the turret. If multiple turrets are eligible at the same time, the halo cycles through all active turret colors. Once an Ultra bonus has started, it is available at the same shot cost that started the bonus. By capturing a dragon with the glowing halo, the reward is multiplied. Color match and shot power are important in this bonus as well.

- The example shows a \$1.40 reward multiplied by 20x to make it a \$28.00 reward!



The Ultra multiplier for each of the 5 groups follows:

- Group 1: 20x
- Group 2: 10x
- Group 3: 5x
- Group 4: 3x
- Group 5: 2x

Penalties

Shot cost is lost if the shot misses all dragons.

Punishment Dragon

Shooting a Shadow Dragon (red X) disables the gun turret for 3 seconds and the player loses the shot cost.



Reward Chart

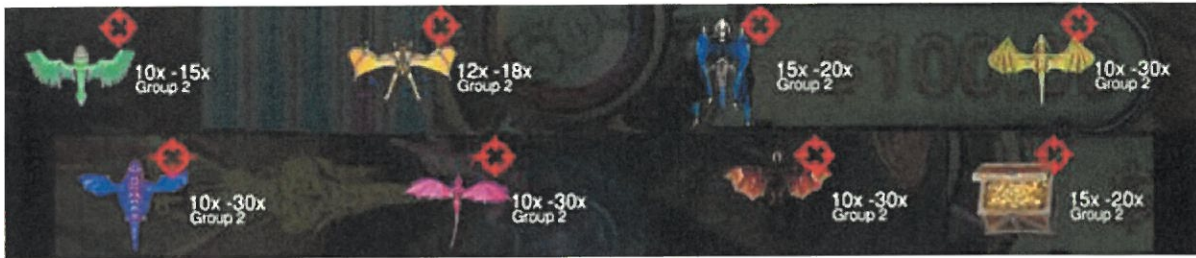
Group 1 Dragons

Shot power is displayed in the far-left vial. Reward ranges from 2 times shot cost to 10 times shot cost depending on color match.



Group 2 Dragons

Shot power is displayed in the second from left vial. Reward ranges from 10 times shot cost to 30 times shot cost depending on color match.



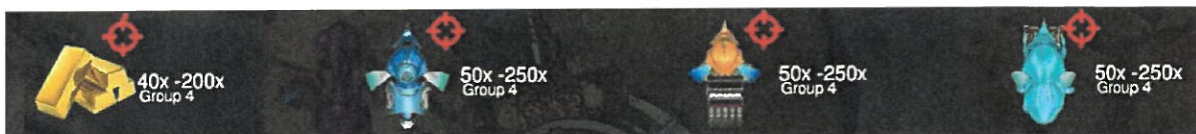
Group 3 Dragons

Shot power is displayed in the third from left vial. Reward ranges from 20 times shot cost to 100 times shot cost and all Ruby dragons range from 30 times to 150 times shot cost depending on color match. The ruby symbolizes the ruby dragons.



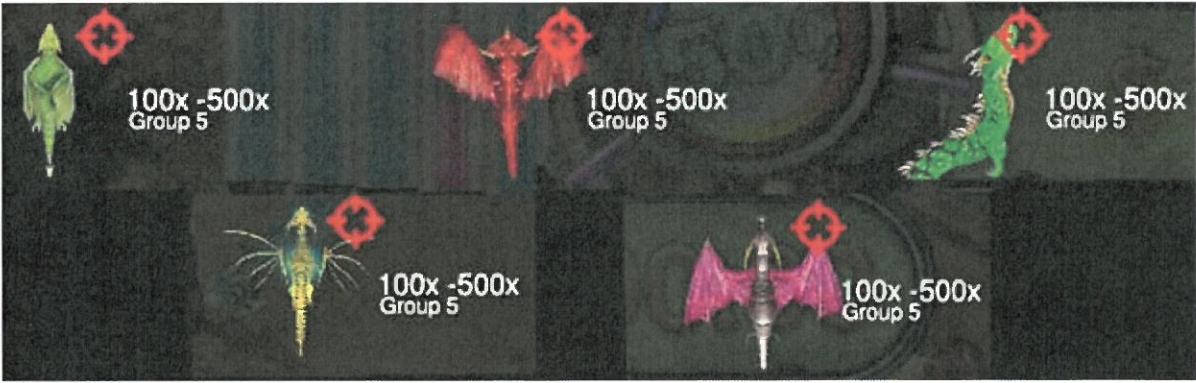
Group 4 Dragons

Shot power is displayed in the second from right vial. Reward ranges from 50 times shot cost to 250 times shot cost and all Gold dragons range from 40 times shot cost to 200 times shot cost depending on color match. The gold symbolizes the gold changelings.



Group 5 Dragons

Shot power is displayed in the far-right vial. Reward ranges from 100 times shot cost to 500 times shot cost depending on color match.



APPENDIX C

Dragon's Ascent System v.DA1 105.02 GEN 12399
Software Signature Information

**Software Verification for
Dragon's Ascent System v.DA1 105.02 GEN 12399 and
Validation Drive Technology Software**

December 9, 2021

Validation Drive Technology Software

The following is a list of the files, which comprise the *Validation Drive Technology* software located on the *Validation Drive* that is used to validate the *Dragon's Ascent System* software. The *Validation Drive Technology* software program must be copied to a USB thumb drive, and executed when installed into the *Dragon's Ascent System* machines. The *Validation Drive Technology* program will obtain an MD5 "signature" of the file(s) that affect system operation and integrity. *Nick Farley & Associates, Inc.* has verified that the *Validation Drive Technology* software operates as intended.

To ensure that the version of the *Validation Drive Technology* software is identical to the one used during our testing, a signatures of the *Validation Drive Technology* software should be obtained and verified using the **FileCheck** program. The **FileCheck** result for the *Validation Drive Technology* software should be identical to the signatures displayed below.

How to obtain signatures

Obtain the following component:

- *Validation Drive*
 - *Obtain a copy of the install software*
 - *USB keyboard.*
1. Insert the *Validation Drive* into a PC.
 2. Copy the "optfs.DA1-105-02-GEN-2021-07-19" and "optfs.DA1-105-02-GEN-2021-07-19.md5" files onto the *Validation Drive*.
 3. Open the locked machine to be verified, turn off the power, and insert the *Validation Drive* into an available USB port on the internal PC.
 4. Insert a USB keyboard into any of available USB ports on the internal PC.
 5. Turn on the power of the machine and utilize the boot options to boot into the *Validation Drive*.
 6. Compare the MD5 signature that is displayed on the screen to the MD5 signature listed in the following section, to validate the software.

FileCheck: F:\ 09/28/2021

Date	Time	Attrib	Bytes	CRC-32	Filename

F:					
08/01/2019	20:41:58	A-----	24,783,051	F59397F2	auth-rd.img.gz
06/19/2018	03:41:42	A-----	43,050,477	31EA36DD	initrd.img-4.8.0-53-generic
09/26/2018	10:07:16	A-----	20,962,077	AB7A1C8D	installer-rd.img.gz
03/24/2016	12:41:50	A-----	116,632	A41D4E7B	ldlinux.c32
07/26/2018	20:53:58	A--SHR	69,632	A1597696	ldlinux.sys
02/18/2020	23:01:18	A-----	21	E6238CD1	overrides
09/27/2018	17:12:04	A-----	20,962,714	9790464B	push-rd.img.gz
10/14/2018	13:17:50	A-----	24,571	0AE3E470	pushCrossfireP2
03/24/2016	12:41:50	A-----	7,158	CF0EC44D	rb
07/31/2019	19:22:12	A-----	137	B3C63282	syslinux.cfg
07/26/2018	20:53:54	-D-SH-			System Volume Information
08/01/2019	20:41:58	A-----	4,245,280	FFFFFFFF	vmlinuz

			929,791,266	F32A8C5A	13 files

**Software Verification for
Dragon's Ascent System v.DA1 105.02 GEN 12399 and
Validation Drive Technology Software**

December 9, 2021

```
F:\System Volume Information
08/12/2018 14:58:36 A-----          76 2915AE18 IndexerVolumeGuid
07/26/2018 20:53:56 A-----          12 6D9C4043 WPSettings.dat
-----
88 8240C480 2 files
```

```
Summary of F:\
Directories ----- 2
Files ----- 15
Bytes ----- 929,791,178
Meta CRC-32 ----- 0DDF7889
```

**Software Verification for
*Dragon's Ascent System v.DA1 105.02 GEN 12399 and
Validation Drive Technology Software***

December 9, 2021

Dragon's Ascent System v.DA1 105.02 GEN 12399

The following is a unique **MD5** signature of the OptFS file, which contains the *Dragon's Ascent System* software. The **MD5** signature for the *Dragon's Ascent System* will be obtained using the *Validation Drive Technology* software, provided the *Dragon's Ascent System* software remains the same as tested. Should the software be altered in any way, the **MD5** value will change.

Component Name	MD5 Signature
optfs.DA1-105-02-GEN-2021-07-19	82FABFA7E6C7C7F76EA6C40DCB6296A0

Please Note: The testing on the *Dragon's Ascent System v.DA1 105.02 GEN 12399* was conducted using the *DualPlay* machine.

Brock Smith
P.O. Box 715
Greenbrier, TN 37073

WORK HISTORY:

- 2017-Present **PACE-O-MATIC, INC.**, Duluth, GA
Director of Studios
Game Design, Math Models
- Project Manager, Dragon's Ascent
 - Responsible for Software engineering, graphics, mathematics and testing of electronic skill game machines
 - Supervision of 17 software engineers
- 2014-2016 **CEVA LOGISTICS**, Mt. Juliet, TN
Production Manager
- Software design and logistics for Dell computer products
 - Supervised 1,200 employees
- 2007-2014 **PACE-O-MATIC, INC.**, Duluth, GA
Product Manager, Lead Game Designer, Hardware Analyst
- Responsible for game design, mathematics and graphics
 - Worked closely with production and logistics
- 2005-2007 **INTERNATIONAL BINGO SUPPLY**, Columbus, Ohio
COO, Game Designer, Sales Manager
- Large multi-state pull tab business
- 2000-2005 **PATHFINDER SERVICE ASSOCIATION**, Columbus, OH
Manager
- Charitable Organization utilizing pull tab games for fundraisers
 - Raised funds directly for education, including a \$500,000 donation to the Ohio State Law Library

EDUCATION:

1996-1999 AUSTIN PEAY STATE UNIVERSITY

\$20.00 in

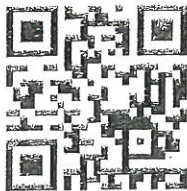
NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

Pace-O-Matic

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 11:59:37 AM

Machine Station 1
NOT VALID

REDEEM \$22.00
NOT VALID



TICKET ID: 00000002

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 42493077
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

\$20.00 in

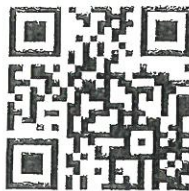
NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

Pace-O-Matic

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:02:37 PM

Machine Station 1
NOT VALID

REDEEM \$23.90
NOT VALID



TICKET ID: 00000003

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 69136999
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

\$20.00 in

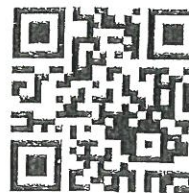
NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

Pace-O-Matic

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:05:15 PM

Machine Station 1
NOT VALID

REDEEM \$24.60
NOT VALID



TICKET ID: 00000004

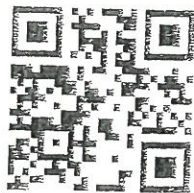
DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 44573301
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

TICKET ID:

00000001



REDEEM \$20.20
NOT VALID

Machine Station 1
NOT VALID

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 11:58:37 AM

Pace-O-Matic

NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

\$20.00 in

VOID IF MUTILATED
VAL#: 87991286
2017-2021 ALL RIGHTS RESERVED
NOT VALID

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

BS

\$20.00 in

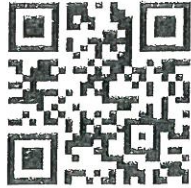
NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

=====
Pace-O-Matic
=====

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:12:04 PM
=====

Machine
Station 1
NOT VALID

REDEEM \$33.40
NOT VALID



TICKET ID: 00000006

**DRAGON'S
ASCENT**
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 11811803
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

\$20.00 in

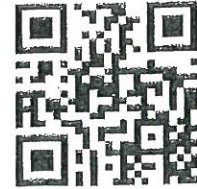
NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

=====
Pace-O-Matic
=====

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:16:11 PM
=====

Machine
Station 1
NOT VALID

REDEEM \$22.61
NOT VALID



TICKET ID: 00000007

**DRAGON'S
ASCENT**
A GAME OF SKILL & STRATEGY

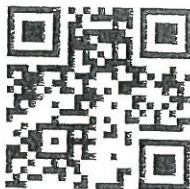
VOID IF MUTILATED
VAL#: 01955345
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

2017-2021 ALL RIGHTS RESERVED
NOT VALID

**DRAGON'S
ASCENT**
A GAME OF SKILL & STRATEGY

TICKET ID: 00000005



REDEEM \$28.80
NOT VALID

Machine
Station 1
NOT VALID

=====
Pace-O-Matic
=====

DA1 105.02 GEN 12399

TID: 419295

TICKET NOT VALID

VOUCHER TICKET

09/30/21, 12:08:24 PM
=====

NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

\$20.00 in

BS

\$20.00 in

NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

Pace-0-Matic

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:21:55 PM

Machine
Station 1
NOT VALID

REDEEM \$20.08
NOT VALID



TICKET ID: 00000009

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 32281211
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

\$20.00 in

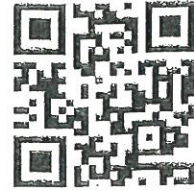
NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

Pace-0-Matic

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:25:09 PM

Machine
Station 1
NOT VALID

REDEEM \$22.00
NOT VALID



TICKET ID: 00000010

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

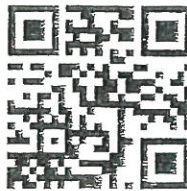
VOID IF MUTILATED
VAL#: 43405364
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

VOID IF MUTILATED
VAL#: 12521219
2017-2021 ALL RIGHTS RESERVED
NOT VALID

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

TICKET ID: 00000008



REDEEM \$20.01
NOT VALID

Machine
Station 1
NOT VALID

Pace-0-Matic

DA1 105.02 GEN 12399

TID: 419295

TICKET NOT VALID

VOUCHER TICKET

09/30/21, 12:18:00 PM

NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

\$20.00 in

BS

\$20 in

NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

Pace-O-Matic

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:30:14 PM

Machine Station 1
NOT VALID

REDEEM \$38.00
NOT VALID



TICKET ID: 00000012

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 35527998
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

\$40 in

NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

Pace-O-Matic

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:32:48 PM

Machine Station 1
NOT VALID

REDEEM \$62.00
NOT VALID



TICKET ID: 00000013

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 32877592
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

VOID IF MUTILATED
VAL#: 78426035
2017-2021 ALL RIGHTS RESERVED
NOT VALID

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

TICKET ID:

00000011



Machine Station 1
NOT VALID
REDEEM \$20.02
NOT VALID

Pace-O-Matic
DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:26:33 PM

NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

\$20 in

BS

\$40.00 in

NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

=====
Pace-O-Matic
=====

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:39:59 PM
=====

Machine
Station 1
NOT VALID

REDEEM \$40.08
NOT VALID



TICKET ID: 00000015

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 52246270
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

\$40.00 in

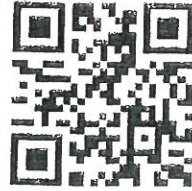
NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

=====
Pace-O-Matic
=====

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:42:18 PM
=====

Machine
Station 1
NOT VALID

REDEEM \$99.00
NOT VALID



TICKET ID: 00000016

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 01686879
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS

\$40.00 in

NOT VALID
THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY!

=====
Pace-O-Matic
=====

DA1 105.02 GEN 12399
TID: 419295
TICKET NOT VALID
VOUCHER TICKET
09/30/21, 12:36:12 PM
=====

Machine
Station 1
NOT VALID

REDEEM \$83.00
NOT VALID



TICKET ID: 00000014

DRAGON'S ASCENT
A GAME OF SKILL & STRATEGY

VOID IF MUTILATED
VAL#: 28256725
2017-2021 ALL RIGHTS RESERVED
NOT VALID

BS





THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY

— LG'S By the Creek

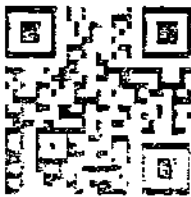
DATE: 02/04/22, 02:16:30 PM

TID: 419295

VOUCHER TICKET

Machine
Station 2

RDLEN \$20.00



VOID IF NOT ILLUSTRATED

DRAGON'S
ASCENT

VOID IF NOT ILLUSTRATED

VAL # : 23018214
2017 2021 ALL RIGHTS RESERVED

THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY

DRAGON'S
ASCENT

TICKET ID: 00000213



Machine
Station 1

RDLEN \$20.00

DATE: 02/04/22, 02:21:20 PM

TID: 419295

VOUCHER TICKET

LG'S By the Creek
ISSUE ONLY
VALID ON DATE OF
PLAYING

THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY

DRAGON'S
ASCENT

TICKET ID: 00000202



Machine
Station 2

RDLEN \$20.00

DATE: 02/04/22, 02:19:30 PM

TID: 419295

VOUCHER TICKET

LG'S By the Creek
ISSUE ONLY
VALID ON DATE OF
PLAYING

THANKS FOR PLAYING
VALID ON DATE OF
ISSUE ONLY

DRAGON'S
ASCENT

TICKET ID: 00000206



Machine
Station 1

RDLEN \$20.00

DATE: 02/04/22, 02:59:27 PM

TID: 419295

VOUCHER TICKET

LG'S By the Creek
ISSUE ONLY
VALID ON DATE OF
PLAYING



11:12

LTE

Yesterday
18:31

100%

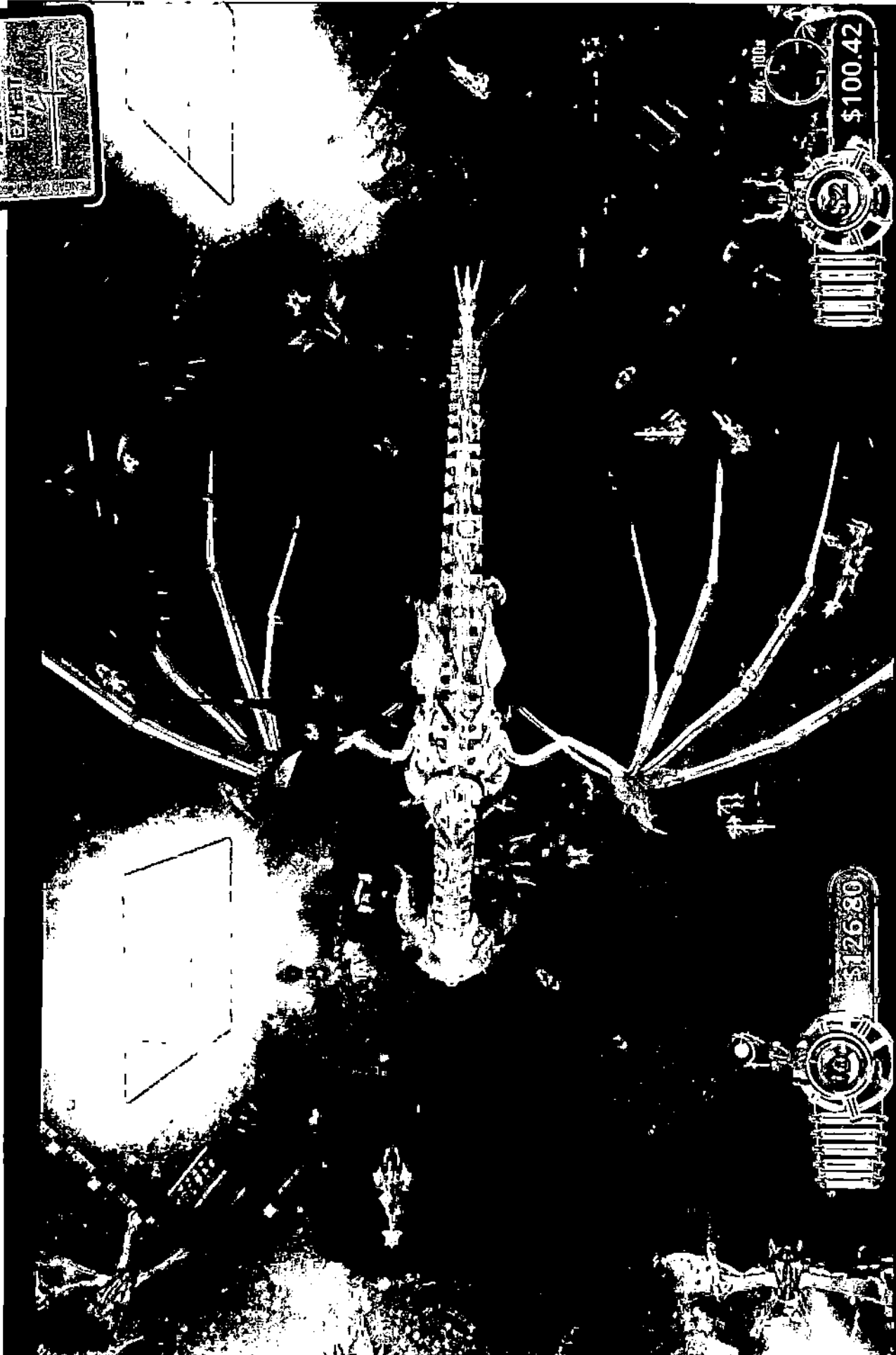
\$1555.41



PLAINTIFF'S
EXHIBIT
2
EN

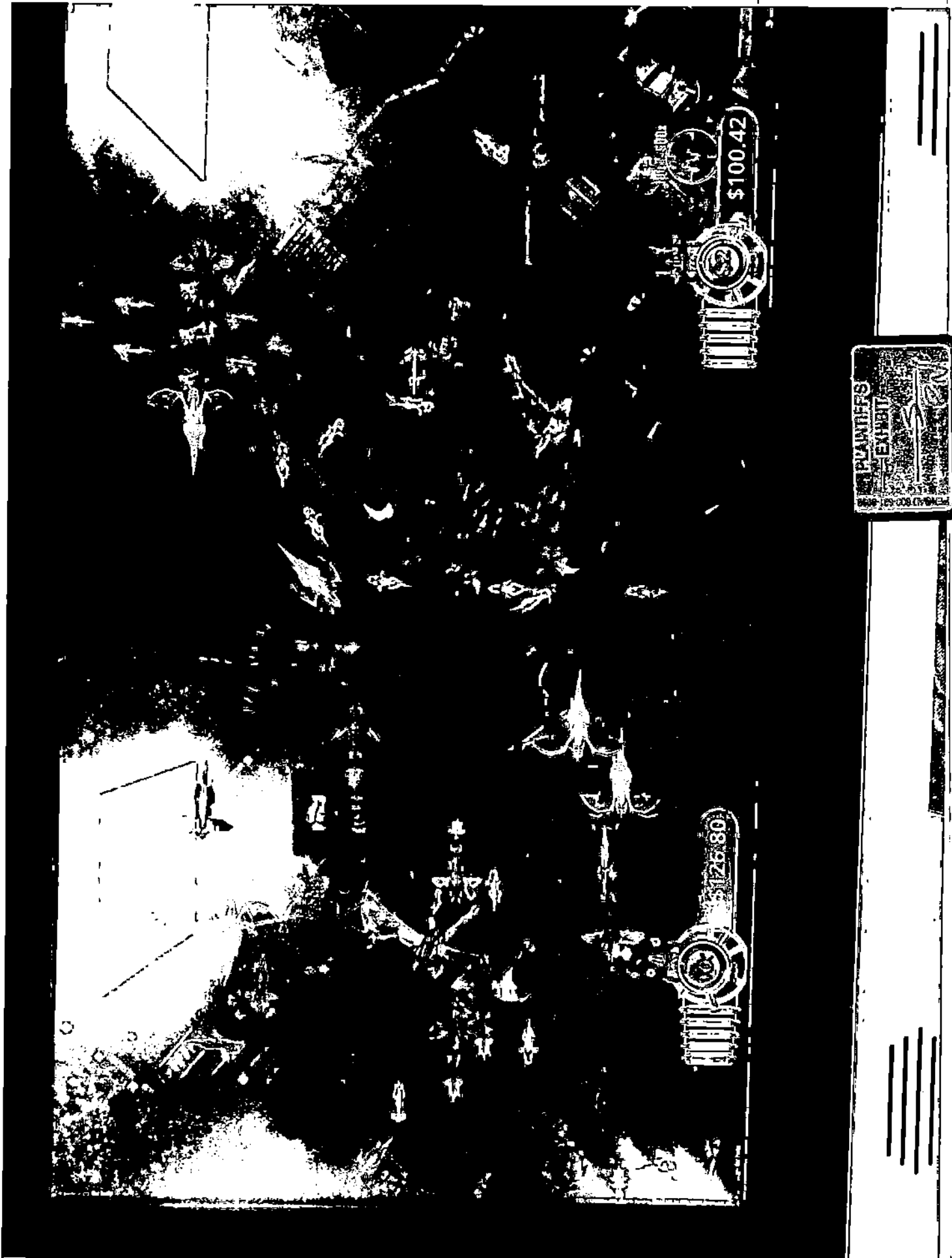


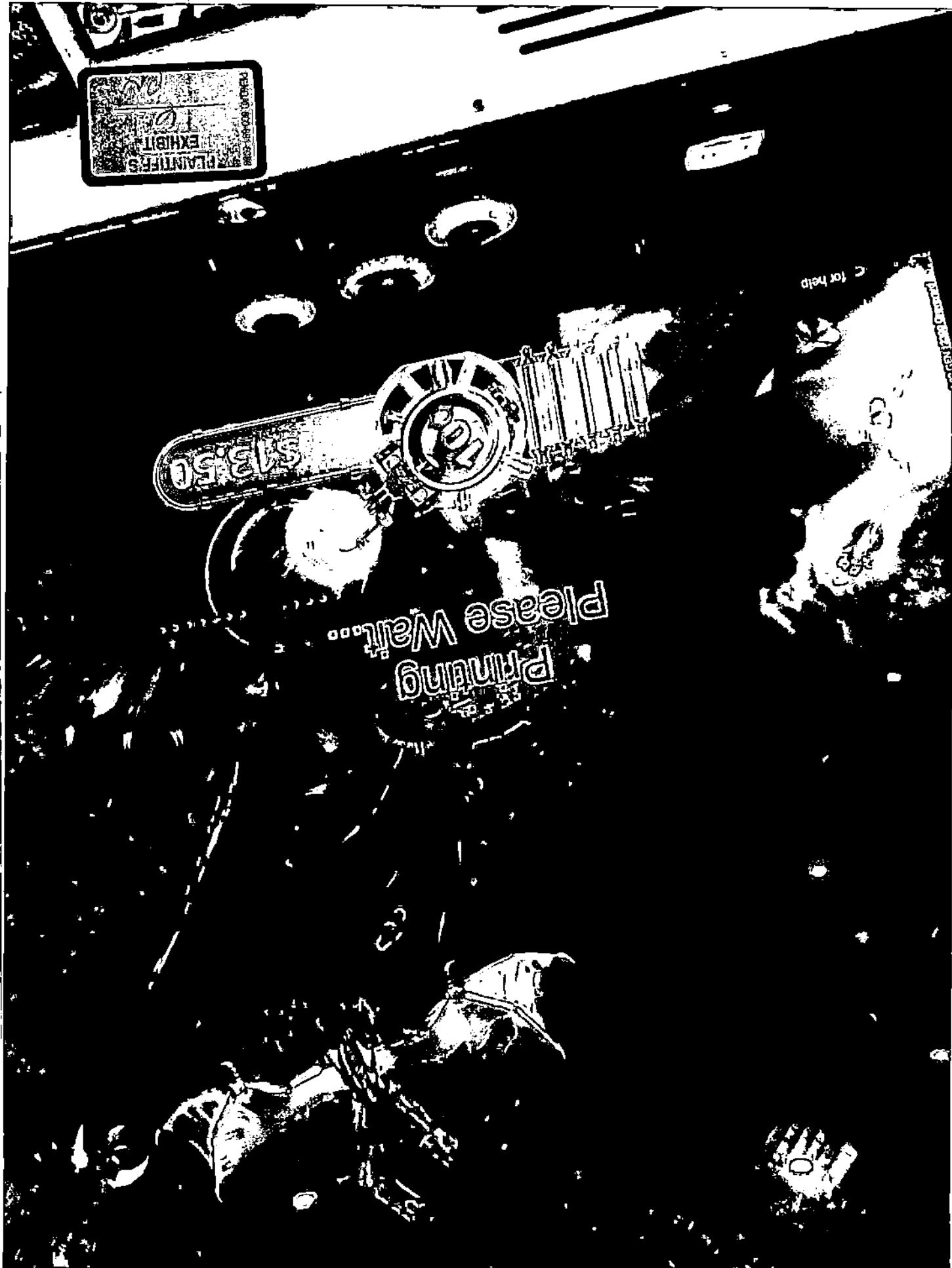
PLANTIFF'S
EXHIBIT
17
1997



\$100.42

\$126.80





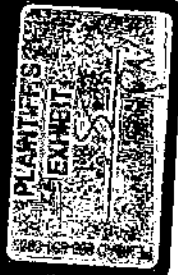
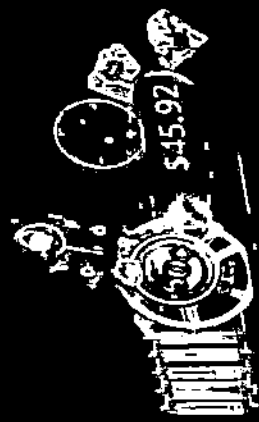
PRINTERS
EXHIBIT

PRINTING
Please Wait...

PRINTING
Please Wait...

for help





Instructions

LOCK-ON MODE
Tap the Lock on button on the Control Panel to switch between "Aim and Fire," and "Lock on"

LOCK-ON MODE



A dotted line follows the path of the intended target. The turret bypasses dragons in the path of the turret to the target dragon. The turret will lock on with a dotted line from the turret to the target dragon. Lock-on mode bypasses dragons in the path of the turret to the target dragon. The turret will lock on with a dotted line from the turret to the target dragon.



\$100.42

PLAINTIFF'S
EXHIBIT
of
[Handwritten Signature]



← Dragon Reward Values

Audit Menu (Machine)

2021-11-30
8:49:13 PM

Description	Archive	Weekly	Daily
LAST CLR DATE	9/29/2021 9:09 AM	11/18/2021 2:58 PM	11/18/2021 2:58 PM
CASH IN	\$19110.00	\$1694.00	\$1694.00
CASH OUT	\$14229.14	\$814.83	\$814.83
I-O Hold	\$4880.86	\$879.17	\$879.17
Hold%	25.541%	51.899%	51.899%
AVG Daily Net	\$78.72	\$73.26	\$73.26
CASH PLAYED	\$99088.20	\$8403.70	\$8403.70
CASH WON	\$94207.34	\$7524.53	\$7524.53
P-W Earned	\$4880.86	\$879.17	\$879.17
Returns	95.074%	89.538%	89.538%
GAMES PLYD	393969	36109	36109
GAMES WON	37205	3569	3569
HIT%	9.44%	9.88%	9.88%



MCM ELEMENTS

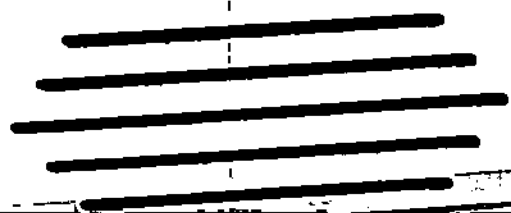
Current Fill:
1

Pending Fill:
0

Fill Remaining %:
51.07%

Instructions:
*To PRINT Audit ticket: Press SHOOT, select column to print, & press SHOOT again.
*To CLEAR Stats: Turn RED key, select column to clear, & press SHOOT.
*To ZOOM MCM OR Code: Press the menu 'Relas Shot Cost' button; Press again to return to audit menu

for help



(Machine)

2022-
11:53



MCM

Description **Archive** **Weekly** **Daily**

DESCRIPTION	9/29/2021	11/18/2021	11/18/2021
LSTCLDATE	9:09 AM	2:58 PM	2:58 PM
CASH IN	\$19670.00	\$2254.00	\$2254.00
CASH OUT	\$14229.14	\$814.83	\$814.83
I-O Hold	\$5440.86	\$1439.17	\$1439.17
Hold%	27.661%	63.85%	63.85%
AVG Daily Net	\$45.34	\$20.86	\$20.86
CASH PLAYED	\$106958.10	\$16273.60	\$16273.60
CASH WON	\$101744.46	\$15061.65	\$15061.65
P-W Earned	\$5213.64	\$1211.95	\$1211.95
Return%	95.126%	92.553%	92.553%
GAMES PLYD	402551	44691	44691
GAMES WON	37882	4246	4246
HIT%	9.41%	9.50%	9.50%

Current Fill: 1
Pending Fill: 0

Fill Remaining \$ 47.98

Instructions:
 *To PRINT Audit ticket: Press SHOOT, select column to print, & press SHOOT again.
 *To CLEAR Status: Turn RED key, select column to clear, & press SHOOT.
 *To ZOOM MCM OR Code: Press the menu 'Raise Shot Cost' button. Press again to return to audit menu



Joystick Menu

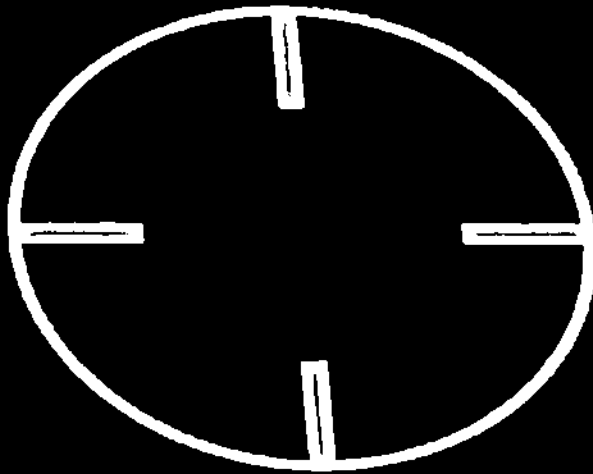
Instructions:

- While holding 'Shoot' or 'Spacebar', move left or right to adjust the deadzone
- Press 'Raise Shot Cost' Button or the 'I' key to invert axes

Max Y: 0.00

X:0

Y:0



Min X: 0.00

Max X: 0.00

Min Y: 0.00

Joystick Inverted: On



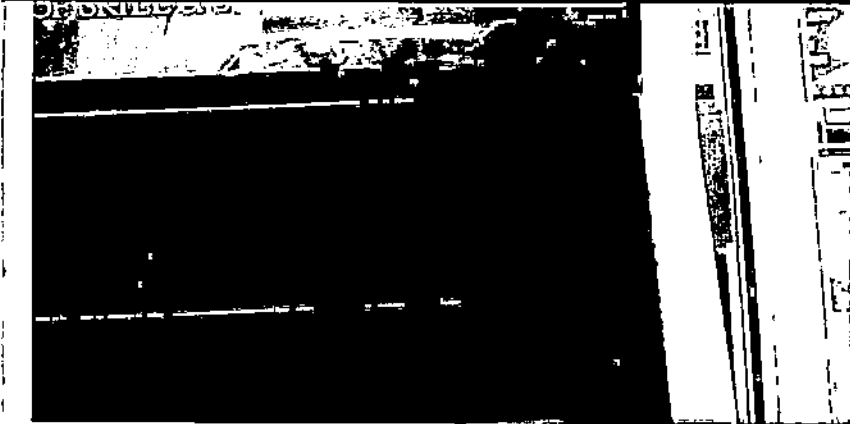
6:08

LTE



Gaming Machines

PDF - 979 KB



PLAINTIFF'S
EXHIBIT
13
Pul

RECEIVED

Nov 22 2023

SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

s/ Adam L. Whitsett

Adam L. Whitsett, Esquire

General Counsel

South Carolina Law Enforcement Division

Post Office Box 21398

Columbia, South Carolina 29221-1398

(803) 896-0647

S.C. Bar Number: 74888

Attorney for Appellants

November 15, 2023